87- 571

Supreme Court, U.S.
FILED
OCT 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. A-203

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

In re: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION, M.D.L. 150

CITY OF LONG BEACH AND STATE OF CALIFORNIA,
Plaintiffs-Petitioners,

VS.

EXXON CORPORATION,
MOBIL OIL CORPORATION,
SHELL OIL COMPANY,
CHEVRON CORPORATION,
(formerly STANDARD OIL COMPANY OF CALIFORNIA),
TEXACO INC., and
UNION OIL COMPANY OF CALIFORNIA,
Defendants-Respondents.

PETITION FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Of Counsel:

SHIRLEY M. HUFSTEDLER
HUFSTEDLER, MILLER, CARLSON & BEARDSLEY
FORTY FIFTH FLOOR
355 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071-3107
(213) 617-7070

OCTOBER 1, 1987

[NAMES AND ADDRESSES OF COUNSEL CONTINUED ON INSIDE COVER]

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

BROAD, SCHULZ, LARSON & WINEBERG
ROYCE H. SCHULZ
GARY L HALLING
612 S. Flower Street, Suite 838
Los Angeles, CA 90017
(213) 626-6300

HOECKER, MCMAHON & WADE
GARY W. HOECKER
M. BRIAN MCMAHON
612 S. Flower Street, Suite 800
Los Angeles, CA 90017
(213) 617-8133

JOHN R. CALHOUN,
City Attorney
JAMES N. MCCABE,
Deputy City Attorney
333 W. Ocean Boulevard
11th Floor
Long Beach, CA 90802

JOHN K. VAN DE KAMP,
Attorney General of
the State of California
SANFORD N. GRUSKIN,
Assistant Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90010
(213) 736-2292

RICHARD N. LIGHT
Deputy Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94102
(415) 557-0211
Attorneys for Petitioners,
The City of Long Beach and
The State of California

QUESTIONS PRESENTED

1. Should a writ issue from this Court vacating an order of the Temporary Emergency Court of Appeals ("TECA") dismissing Petitioners' appeals on the grounds of non-justiciability and mootness when (a) the issues on appeal to TECA are neither non-justiciable nor moot, (b) TECA has exclusive appellate jurisdiction of the Price Controls issues, and (c) the United States Court of Appeals for the Ninth Circuit has stayed the antitrust appeals pending TECA's decision of the Price Controls issues?

2. Should a writ issue requiring TECA to decide the appeals on the merits when the order of dismissal of the appeal rests on grounds rejected by this Court?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
I. Introduction	3
II. Summary of the District Court Proceedings	5
REASONS FOR GRANTING THE WRIT	9
I. This Court Has Unquestioned Power Under The All Writs Act To Cut Through The Jurisdictional Impasse By Issuing The Writ	9
II. TECA Has Exclusive Jurisdiction Over The Neeb Issue	11
III. TECA Erroneously Dismissed The Appeal Because The Neeb Issue Is Neither Moot Nor Non-justiciable	13
CONCLUSION	16

INDEX TO APPENDICES

APPENDIX A.	Opinion of the Temporary Emergency Court of Appeals of the United States Dated August 18, 1987. William H. Becker, Judge, Concurring. Homer Thornberry, Judge, Dissenting.
APPENDIX B.	Opinion of the District Court Dated July 17, 1984, Memorandum of Decision on Defendants' Motions for Partial Summary Judgment Based Upon Federal Price Ceilings. Notice of Entry.
APPENDIX C.	Findings of Fact and Conclusions of Law in Support of Partial Summary Judgment Based Upon Federal Price Ceilings and the Entitlements Program.
APPENDIX D.	Order, Dated January 22, 1985.
APPENDIX E.	Order, Dated October 29, 1986.
APPENDIX F.	Order, Dated August 24, 1987.
APPENDIX G.	Letter to Messrs. Ferguson and Albright, Dated April 12, 1972 from Louis P. Neeb.
APPENDIX H.	Letter to Price Commission, Dated February 25, 1972, From Messrs. Ferguson and Albright.
	Statutory Appendix — United States Constitution, Art. III and Pertinent Statutes Involved.

TABLE OF AUTHORITIES

Cases

	Page
Christianson v. Colt Industries Operating Corp., 798 F.2d 1051 (7th Cir. 1986)	13
Christianson v. Colt Industries Operating Corp., 822 F.2d 1544 (Fed. Cir. 1987)	12
Eisler v. United States, 338 U.S. 189 (1949)	14
Harley-Davidson Motor Co., Ex Parte, 259 U.S. 414 (1922)	10
Immigration and Naturalization Service v. Phinpathya, 464 U.S. 183, 104 S.Ct. 584 (1984)	14
Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922)	8
Kumezo Kawato, Ex Parte, 317 U.S. 69 (1942)	10, 11
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)	14
McClellan v. Carland, 217 U.S. 268 (1910)	11
Mobil Oil Corp. v. Dept. of Energy, 728 F.2d 1477 (Temp. Emer. Ct. App. 1983), *cert. denied*, 467 U.S. 1255 (1984)	11
Mobil Oil Corp. v. Tully, 639 F.2d 912 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981)	12
Northern Oil Co. v. Standard Oil Co. of Cal., 761 F.2d 699, 703 (Temp. Emer. Ct. App.) *cert. denied*, 474 U.S. 821 (1985)	11
Peru, Ex Parte, 318 U.S. 578 (1943)	10
Quincy Oil, Inc. v. Federal Energy Administration, 620 F.2d 890, 893 (Temp. Emer. Ct. App. 1980)	12
Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943)	10
United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568 (1985)	13

TABLE OF AUTHORITIES

CASES

	Page
United States v. Wickland, 619 F.2d 75, 77 (Temp. Emer. Ct. App. 1980)	11
United States v. Wyatt, 680 F.2d 1080 (5th Cir. 1982)	12
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)	14

Constitution

United States Constitution, Article III, Sec. 2 2

Rule

Federal Rules of Civil Procedure, Rule 54(b) 4

Statutes

12 U.S.C., Sec. 1904 ..... 2, 6, 9, 11
15 U.S.C., Sec. 751-760(h) 7
15 U.S.C., Sec. 754(a)(1) 2, 9
28 U.S.C., Sec. 1254(1) 2
28 U.S.C., Sec. 1291 4
28 U.S.C., Sec. 1292(b) 9
28 U.S.C., Sec. 1331 2
28 U.S.C., Sec. 1651(a) 2, 10
42 U.S.C., Sec. 6201 7
Economic Stabilization Act of 1970 ..... 2, 6, 9, 11
Energy Policy and Conservation Act 7
Emergency Petroleum Allocation Act of 1973 ... 2, 6, 7, 9
Sherman Act, Secs. 1 & 2 3

No. A-203

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

In re: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION, M.D.L. 150

CITY OF LONG BEACH AND STATE OF CALIFORNIA,
Plaintiffs-Petitioners,

VS.

EXXON CORPORATION,
MOBIL OIL CORPORATION,
SHELL OIL COMPANY,
CHEVRON CORPORATION,
(formerly STANDARD OIL COMPANY OF CALIFORNIA),
TEXACO INC., and
UNION OIL COMPANY OF CALIFORNIA,
Defendants-Respondents.

PETITION FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION TO THE TEMPORARY EMERGENCY COURT OF APPEALS

OPINIONS BELOW

The Opinion of the Temporary Emergency Court of Appeals, dated August 18, 1987, is printed in Appendix A. The Opinion of the District Court, dated July17, 1984, is printed in Appendix B. The District Court's Findings of Fact and Conclusions of Law are in Appendix C. The appendices also contain Orders of the Ninth Circuit concerning jurisdiction over Price Controls issues and stay of proceedings (Appendices D, E and F).

JURISDICTION

The basis for subject matter jurisdiction of these antitrust actions in the District Court is 28 U.S.C. § 1331. The jurisdiction of TECA is based upon § 211(b) (2) of the Economic Stabilization Act of 1970 ("ESA"), as amended, 12 U.S.C. § 1904 Note, which was incorporated by reference in the Emergency Petroleum Allocation Act of 1973 ("EPAA"), Pub.L. 93-159, 87 Stat. 627 (1973), 15 U.S.C. § 754(a) (1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and the All Writs Act, 28 U.S.C. § 1651(a). TECA filed its decision on August 18, 1987. By Order of this Court, dated September 8, 1987, Petitioners were granted until October 1, 1987 to file their petition for certiorari.

STATUTORY PROVISIONS INVOLVED

This case involves Sec. 211(b) (2) of the ESA of 1970, as amended, 12 U.S.C. § 1904 Note, incorporated by reference in EPAA of 1973, 15 U.S.C. § 754(a) (1). It is set out in the statutory Appendix. Also involved are 28 U.S.C. § 1254(1) and the All Writs Act, 28 U.S.C. § 1651(a), and Article III, Sec. 2 of the United States Constitution.

STATEMENT OF THE CASE

I. Introduction

Without the aid of this Court, Petitioners are trapped in an appellate jurisdictional quagmire from which they cannot escape. Petitioners face an impasse as to whether TECA or the Ninth Circuit has jurisdiction over one of the issues on appeal.

The litigation began 12 years ago when the Petitioners, the State of California and the City of Long Beach, filed their action against the Respondents, buyers of Petitioners' crude oil, seeking hundreds of millions of dollars in damages for Respondents' violations of Sections 1 and 2 of the Sherman Act, by reason of their conspiracy to fix prices for the purchase of crude oil.

In August 1971, a few months after the beginning of Petitioners' damage period, Price Controls were instituted which locked in existing prices of crude oil. Under Price Controls, ceiling prices for crude oil were pegged to prices existing immediately before Price Controls went into effect. If Respondents had not conspired to set artificially low crude oil prices prior to Price Controls, the price which Petitioners would have received during Price Controls would have been higher. Petitioners claim dam-

ages measured by the difference in the price that Petitioners would have received but for the price fixing conspiracy and the price that was actually received from their sales of crude oil to Respondents during the Price Controls period.

In one of the partial summary judgments, the district court held that a letter from an employee of the Price Controls Commission, Louis P. Neeb, cut off Petitioners' antitrust damages. The legal effect of the letter turns on the authority of the Price Controls Commission and its employee, administering under the ESA, either to curtail or to eliminate damages for violation of the Sherman Act during Price Controls.

Petitioners have taken appeals to TECA and the Ninth Circuit. Appellate jurisdiction of issues arising under ESA and EPAA lies exclusively with TECA. Appellate jurisdiction over all the remaining issues in the several appeals lies exclusively with the United States Court of Appeals for the Ninth Circuit.[1] The Ninth Circuit has thus far stayed proceedings on the appeals before it, pending a decision by TECA of those issues within TECA's exclusive jurisdiction.

Only this Court can break the jurisdictional deadlock. Neither appellate court has asserted jurisdiction over the

---

[1]The three cases on appeal are Courts 1 and 2 of the "*Long Beach trust case*," CV 75-2232, Count 5 of the "*California* case," CV 76-2839 and the "*Long Beach proprietary* case," CV 82-3252. In the District Court, Count 5 of the *California* case was severed and stricken from that case and consolidated for all purposes with the *Long Beach trust* case. Count 5 is the only cause of action in the *California* case on appeal here. The *Long Beach trust* case and the *California* case were jointly appealed pursuant to Rule 54(b), Fed. R. Civ. P., TECA Appeal No. 9-95. The *Long Beach proprietary* case was appealed pursuant to 28 U.S.C. § 1291, TECA Appeal No. 9-96. The appeals were consolidated in TECA.

Price Controls issue. The Ninth Circuit has apparently ruled that it does not have jurisdiction over the Price Controls issue. But even if the Ninth Circuit should change its mind and decide the Price Controls issue, its decision would be *pro tanto* invalid if it has no jurisdiction over that subject matter. If it should transfer that issue to TECA, TECA could once again decline to decide the issues until the Ninth Circuit first decides the antitrust issues. These results are intolerable to the litigants and inimical to the administration of federal justice.

TECA's rationale for dismissing the appeal is confused. There are three separate opinions, the reasoning of each is internally inconsistent, and none of the opinions can be harmonized with any of the others. The majority of the panel appears to have decided that the issues before it are either non-justiciable or moot because a decision of the issues will no longer be required if the Ninth Circuit upholds the District Court's fourth summary judgment on the ground that the massive evidence introduced by the proponents and opponents failed to show a triable issue of fact on the existence of a conspiracy among the Respondents. Under the controlling decisions of this Court, the issues before TECA were neither non-justiciable nor moot.

II. Summary of the District Court Proceedings.

Petitioners sell crude oil in California to Respondents under long-term contracts. This marathon litigation began when Petitioners filed three antitrust actions against the Respondents, two in 1975 and one in 1982. After lengthy and complex discovery proceedings, motions, and procedural skirmishing, the District Court granted four partial summary judgments in favor of Respondents on

four independent grounds.[2] In three separate summary judgments it ruled that three federal government programs which operated before and during the damage period relieved Respondents of any liability for the low prices Respondents paid for Petitioners' crude oil. These programs were the Mandatory Oil Import Program ("MOIP"), the Federal Price Controls Program ("Price Controls") and the Federal Entitlements Program ("Entitlements").[3] In addition, the district court granted summary judgment on the ground that Petitioners had presented insufficient evidence of a conspiracy.

All of these partial summary judgments were appealed to the Ninth Circuit and to TECA. The Price Controls issues in the appeals were consolidated in TECA. Appeals on all other issues lie within the exclusive jurisdiction of the Ninth Circuit. The Ninth Circuit has suspended a briefing schedule pending the determination by TECA of the Price Controls issues.

Beginning on August 15, 1971, Phase I of Price Controls locked in the existing price levels of crude oils.[4]

---

[2]The *Long Beach trust* case still has a breach of contract claim before the district court. That claim is still in the pretrial stage.

[3]The Price Controls summary judgment decision was entered July 19, 1984. The Entitlements summary judgment decision was entered December 13, 1984. The summary judgments on MOIP and price fixing conspiracy were entered on June 19, 1985. MOIP was in effect from March 10, 1959 to April 18, 1973. Price Controls was in effect from August 15, 1971 through the end of the damage period. Entitlements was in effect from November 1, 1974 through the end of the damage period.

[4]Price Controls was initiated by the Economic Stabilization Act of 1970 ("ESA"), as amended, Pub. L. 91-379 (1970), 12 U.S.C. Sec. 1904 Note. It expired on April 30, 1974. It was succeeded by the Emergency Petroleum Allocation Act of 1973 ("EPAA"), Pub. L. 93-159, 87 Stat. 627 (1973), § 15 U.S.C. §§ 751-760(h) (1976). The

Because ceiling prices were based solely on existing prices immediately preceding the imposition of Price Controls, the ceiling price for Petitioners' crude oil would have been higher absent Respondents' price fixing. The District Court denied Respondents' summary judgment for the eight months after the imposition of price controls, holding that neither the passage of the ESA nor the imposition of Price Controls released Respondents from responsibility for conspiratorially lowering the purchase price of crude oil. Nevertheless, the District Court terminated Petitioners' right to any antitrust recovery as of April 12, 1972, based on the District Court's interpretation of the legal effect of a letter from Louis P. Neeb, Executive Secretary of the Price Commission, to two trade associations of California crude oil producers. (The Neeb letter is attached as Appendix G.)

The Neeb letter was written in response to a letter dated February 25, 1972, from two California trade associations, requesting that their members be relieved from Price Controls to the extent necessary to bring California crude oil prices into parity with crude oil prices in other parts of the Nation. (The letter of the trade associations is attached as Appendix H.) Mr. Neeb neither rejected nor approved price relief; he referred to the Price Commission's "established" policy of not making "decisions on price increases for a number of firms," and suggested that the Commission would consider requests for price relief upon application by individual firms.

The District Court decided that the Neeb letter cut off all antitrust recovery from the date the letter was written to the end of Price Controls. Although the District Court's reasoning is extremely difficult to follow, the

---

Energy Policy and Conservation Act ("EPCA"), Pub. L. 94-163, 89 Stat. 871, 42 U.S.C. § 6201, Note (1975), amended portions of EPAA.

District Court appears to have decided that Mr. Neeb was properly exercising the exclusive power of the Price Controls Commission to set and to adjust price ceilings and that the power of the Commission to set such prices effectively suspended or abolished Petitioners' private right of action for antitrust damages suffered from Respondents' price fixing conspiracy, although the conspiracy set the ceiling price for crude oil during Phase I.[5]

The power of the Price Controls Commission and of its employee, Mr. Neeb, under the Price Controls legislation, to nullify Petitioners' antitrust damages is the key issue presented to TECA in the appeal that TECA has ordered dismissed. The District Court's decision of the "Neeb issue" eliminated approximately 85 percent of Petitioners' antitrust damages.[6]

---

[5]The district court stated that the Neeb letter "supplanted the conspiracy as the effective reason for the level of control prices." Memorandum of Decision at 7, Appendix B. The district court cited *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), as supporting its views that "the legal rights of Long Beach as against the defendants with respect to prices that may be charged and received are measured by the pertinent Price Controls . . ." *Id.* at 8. The court's reliance on *Keogh* suggests that its determination rested on an assumption that the agency had exclusive jurisdiction and that its jurisdiction over price controls nullified Petitioners' antitrust rights.

[6]The Price Controls decision raises two additional issues: whether regulations of the Price Commission exempted from Price Controls the sale of crude oil by state and local governments, *i.e.*, whether Petitioners could be subjected to any ruling by Mr. Neeb, and whether Respondents were free during Phase III of Price Controls to raise crude oil prices to competitive levels and, thus, even if the Neeb letter had relieved Respondents of antitrust liability, whether Respondents' failure to raise crude prices to competitive levels during Phase III reinstated their antitrust liability. Respondents admit that these two issues are within the exclusive jurisdiction of TECA.

The "Neeb issue" is composed of three intertwined subissues: (1) Did the Price Controls Commission have the necessary Congressional and Executive authority to cut off Petitioners' antitrust rights? (2) Was Mr. Neeb authorized by his employment to abrogate Petitioners' antitrust rights? (3) Was Mr. Neeb's letter an effective denial of an application for exceptional relief under the Price Controls regulations?

All of these issues arise under the ESA and EPAA and must, therefore, be within TECA's exclusive appellate jurisdiction.[7] The Ninth Circuit stayed its briefing schedule pending TECA's decision and has not set a briefing schedule following the TECA order dismissing Petitioners' appeals. Petitioners, therefore, look to this Court to resolve the impasse.

REASONS FOR GRANTING THE WRIT

I. This Court Has Unquestioned Power Under The All Writs Act To Cut Through The Jurisdictional Impasse By Issuing The Writ.

The power of this Court, in exercise of its sound discretion, to issue mandamus is established both by statute and by decisions of this Court. 28 U.S.C. § 1651(a). *E.g., Roche v. Evaporated Milk Ass'n,* 319 U.S. 21 (1943); *Ex Parte Peru,* 318 U.S. 578 (1943).

---

[7]The Ninth Circuit agreed. That court denied Petitioners' earlier petition to appeal the price controls issues to it under 28 U.S.C. § 1292(b). In denying relief, the court stated: "The Temporary Emergency Court of Appeals has exclusive jurisdiction over cases arising under the Economic Stabilization Act, 12 U.S.C. § 1904 Note, the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1), and regulations thereunder. These appeals appear to qualify as arising under those provisions [citations omitted]." Order, January 22, 1985, Appendix D.

This Court has long held that mandamus is an appropriate remedy when a lower court has erroneously abated an action, thereby refusing to take jurisdiction of a case within its jurisdiction. For example, in *Ex Parte Kumezo Kawato,* 317 U.S. 69 (1942), the petitioner, born in Japan, became a resident of the United States in 1905. In 1941, he filed a libel in admiralty in the district court claiming wages as a seaman and sought allowance for maintenance and cure for injuries sustained aboard the vessel. The district court abated the action on the ground that petitioner had no right to prosecute an action in any court of the United States during pendency of World War II. The Ninth Circuit denied a petition seeking mandamus to compel the district court to vacate its judgment and to proceed to trial of the action. The motion for leave to file was denied without opinion. In issuing the writ, this Court said:

> Unless the action was properly abated for the reasons set out in the motion and the Court's order, the petitioner is entitled to have the District Court proceed with his action and pass upon the sufficiency of his allegations. This is an essential step in an orderly trial leading to a final judgment from which an appeal will lie to correct errors. If the Court's order of abatement was erroneous, mandamus is the appropriate remedy. [Citations omitted.]

317 U.S. at 71.[8]

---

[8]*Accord, Ex Parte Harley-Davidson Motor Co.,* 259 U.S. 414 (1922). Following a district court's order granting an interlocutory injunction as a means of propounding questions of infringement to the Circuit Court of Appeals in a patent case, the Court of Appeals dismissed the appeal as pro forma, leaving in effect the interlocutory order granting an injunction. Because the Court of Appeals had acquired jurisdiction, it was required to exercise the jurisdiction

Appeals in which some issues are within the exclusive jurisdiction of two different appellate courts always present procedural dilemmas for both the litigants and the courts. However, when one court declines to decide the issue exclusively committed to it, awaiting the decision of the other, or when both courts decline to proceed, the litigants are put in an impossible position. The only Court that can compel TECA to decide the issues on appeal before it is this Court, exercising its supervisory powers over the federal judicial system.

II. TECA Has Exclusive Jurisdiction Over The Neeb Issue.

As the TECA court recognized, TECA has exclusive jurisdiction of all appeals from district courts "in cases and controversies arising under this Title [ESA] or under regulations or orders issued thereunder." (§ 211(b)(2) of ESA of 1970, as amended, 12 U.S.C. § 1904 Note); Memorandum of Decision at 10; *United States v. Wickland,* 619 F.2d 75, 77 (Temp. Emer. Ct. App. 1980). TECA's exclusive jurisdiction extends to issues that arise under ESA or EPAA. *Northern Oil Co. v. Standard Oil Co. of Cal.,* 761 F.2d 699, 703 (Temp. Emer. Ct. App.), *cert. denied,* 474 U.S. 821 (1985); *Mobil Oil Corp. v. Dept, of Energy,* 728 F.2d 1477, 1497 (Temp. Emer. Ct. App. 1983), *cert. denied,* 467 U.S. 1255 (1984). As TECA stated in *Northern Oil, supra:* "[J]urisdiction is not an either-or proposition with regard to the case as a whole. Rather the Court takes jurisdiction over those issues which it has authority to decide, refusing to hear

---

conferred. This Court issued a writ of mandamus directing the Court of Appeal to decide the case; *see also McClellan v. Carland,* 217 U.S. 268 (1910) (mandamus issued to compel former circuit court to decide case abated pending adjudication of later-filed state court action.)

any others, although they are all part of the same case or controversy." 761 F.2d at 703.

The fact that the question within the exclusive jurisdiction of TECA may be intertwined with antitrust issues does not deprive TECA of its exclusive jurisdiction to decide those issues committed to it. *United States v. Wyatt,* 680 F.2d 1080 (5th Cir. 1982) (all "predicate issues" in an appeal from a criminal conviction for violation of an EPAA regulation were within TECA's jurisdiction before constitutional challenge could be addressed). *See also, Mobil Oil Corp. v. Tully,* 639 F.2d 912 (2d Cir.), *cert. denied,* 452 U.S. 967 (1981).[9]

TECA must itself be bound by its own rationale in *Quincy Oil, Inc., supra.* It must realistically examine the Neeb issue before it, even though that issue involves the interplay between ESA and EPAA and the antitrust laws. The Neeb issue requires an interpretation of administrative conduct under the statutory scheme of ESA. TECA is not only an appropriate forum, it is, by statute, the only appropriate forum for determination of the entirety of the Price Controls issues.

The suggestion in the TECA opinions that the Ninth Circuit may have jurisdiction over the Neeb issue does not resolve the jurisdiction problem. Even if the suggestion had been a holding, that decision does not bind the Ninth Circuit. That decision would only lead to the further jurisdictional dilemma illustrated by *Christianson v. Colt*

---

[9]TECA itself frequently has rejected attempts to restrict its jurisdiction by artful characterization of an issue, explaining that the TECA jurisdiction grant must be construed to allow it to perform "the necessary and normal functions of any appellate court." *Quincy Oil, Inc. v. Federal Energy Administration,* 620 F.2d 890, 893 (Temp. Emer. Ct. App. 1980). Thus, where an "issue," regardless of the label assigned to it by one party, depends on an ESA or EPAA issue, TECA's exclusive jurisdiction must be exercised.

Industries Operating Corp., 822 F.2d 1544 (Fed. Cir. 1987). In *Christianson* the Federal Circuit transferred the action to the Seventh Circuit after finding it did not have jurisdiction because the district court's jurisdiction was not based on 28 U.S.C. § 1338. The Seventh Circuit, however, *sua sponte*, ruled that the transfer was "clearly wrong" and sent the case back to the Federal Circuit. *Christianson v. Colt Industries Operating Corp.*, 798 F.2d 1051 (7th Cir. 1986). On retransfer, the Federal Circuit determined that the Seventh Circuit's transfer was "clearly wrong." 822 F.2d at 1551 n.7. Nevertheless "in the interest of justice", *id.* at 1559-60, the Federal Circuit decided the appellant's antitrust claims. Any decision by TECA to transfer the Neeb issue to the Ninth Circuit is equally likely to cause the Ninth Circuit to transfer the issue back to TECA because the issue so clearly arises under ESA and EPAA.

III. TECA Erroneously Dismissed The Appeal Because The Neeb Issue Is Neither Moot Nor Non-justiciable.

Although the TECA opinions sometimes argue that the court is being asked for an advisory opinion and that there is no live controversy over the Neeb issue, the record reveals that the observation is plainly mistaken. The Neeb issue is alive and hotly contested. As the full text of the TECA opinions reveals, the basis for both the mootness and non-justiciability rationales is that the issue would become moot at a future time if the Ninth Circuit upheld the District Court's fourth summary judgment on the ground that the record presented no triable issue of fact relating to the existence of a conspiracy among the Respondents to fix prices.

An issue is not moot and a suit is justiciable, even if a mooting event may later occur. For example, in *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 1573 n.2

(1985), this Court observed: "that the case may become moot if a defendant does not return does not distinguish it from any other case we decide. For subsequent events may render any decision nugatory," quoting *Eisler v. United States,* 338 U.S. 189, 194 (1949). *See also, Immigration and Naturalization Service v. Phinpathya,* 464 U.S. 183, 104 S.Ct. 584, 588 n.6 (1984); *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 53 n.15 (1980); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 692 n.32 (1979).

The MOIP, Price Controls and Entitlements summary judgments taken together provide a completely sufficient basis for dismissing plaintiffs' antitrust claims. The summary judgment based on the lack of evidence of a conspiracy provides another sufficient basis. If TECA were to decide the Price Controls issues against Petitioners, then the Ninth Circuit could dispose of the rest of these appeals by deciding the MOIP and entitlements issues against Petitioners. By refusing to rule on the Price Controls issues, TECA forces the Ninth Circuit to rule on the sufficiency of the evidence supporting allegations of conspiracy. Moreover, as Judge Thornberry in dissent convincingly argues, the Ninth Circuit could, with equal reasoning decide to do nothing. It could decline to rule on the summary judgment concerning the sufficiency of evidence because a MOIP-Price Controls-Entitlements holding could preclude recovery.

If the Ninth Circuit were to apply TECA's reasoning, Petitioners would be prevented at this time from briefing and obtaining a decision on Entitlements. The district court's ruling that Entitlements cut off Petitioners' right to recover damages from November 1, 1974 through the end of the damage period would be surplusage given the

court's Price Controls ruling which cuts off damages from April 12, 1972 through the end of the damage period.[10]

This Court should order TECA to decide now all issues within its exclusive jurisdiction. Petitioners should not be bounced back and forth between appellate courts.

---

[10]Judge Thornberry's dissenting opinion did not go far enough because he agreed that the Neeb issue should be dismissed. If TECA were to rule against petitioners on all Price Controls issues including the Neeb issue, the Ninth Circuit would not have to decide the Entitlements issue no matter what the outcome of the MOIP and sufficiency of the evidence issues. Entitlements was in effect while Price Controls was in effect and after the Neeb letter was written.

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari, mandamus and prohibition should be granted and the judgment of TECA should be reversed.

Respectfully submitted,

John K. Van De Kamp,
Attorney General of the
State of California
Sanford N. Gruskin,
Assistant Attorney General
3580 Wilshire Blvd.
Los Angeles, CA 90010
(213) 736-2292

Richard N. Light
Deputy Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94102
(415) 557-0211

Attorneys for Petitioners,
The City of Long Beach and
The State of California

Of Counsel:

Shirley M. Hufstedler
Hufstedler, Miller, Carlson
& Beardsley
Forty Fifth Floor
355 South Grand Avenue
Los Angeles, CA 90071-3107
(213) 617-7070

Broad, Schulz, Larson &
Wineberg
Royce H. Schulz
Gary L. Halling
612 S. Flower Street,
Suite 838
Los Angeles, CA 90017
(213) 626-6300

Hoecker, McMahon & Wade
Gary W. Hoecker
M. Brian McMahon
612 S. Flower Street,
Suite 800
Los Angeles, CA 90017
(213) 617-8133

John R. Calhoun, City Attorney
James N. McCabe,
Deputy City Attorney
333 W. Ocean Blvd., 11th Floor
Long Beach, CA 90802

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TECA Nos. 9-95 and 9-96 (Consolidated)

In Re: Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation, M.D.L. 150

City of Long Beach and State of California,
Plaintiffs-Appellants,

v.

Exxon Corporation,
Mobil Oil Corporation,
Shell Oil Company,
Chevron Corporation,
(formerly Standard Oil Company of California),
Texaco, Inc. and
Union Oil Company of California,
Defendants-Appellees.

Appeals from the United States District Court
for the Central District of California
(MDL 150-WPG CV 75-2232 LONG BEACH: C.D. Cal. CV 76-2839 and CV 82-3252)

(Argued: February 13, 1987 Decided: August 18, 1987)

Gary W. Hoecker and M. Brian McMahon of Hoecker & McMahon, Royce H. Schulz, William L. Jaeger and Gary L. Halling of Broad, Schulz, Larson & Wineberg; John R. Calhoun and Robert W. Parkin, City Attorneys and James N. McCabe and Robert G. Austin, Deputy City Attorneys of City of Long Beach; John Van DeKamp, Attorney General, Michael Spiegel, Charles M. Kagay

and Sanford N. Gruskin, Deputy Attorneys General of State of California; Taylor R. Briggs, Kimba M. Wood, Howard S. Ockman and Molly S. Boast of LeBouef, Lamb, Leiby and MacRae, attorneys for plaintiffs-appellants.

RONALD C. REDCAY, Otis Pratt Pearsall and Matthew T. Hearney of Hughes Hubbard and Reed; Anthony P. Brown, Walter R. Allan, Phillip L. Judson, Robert P. Taylor and Edward V. Anderson of Pillsbury, Madison & Sutro, attorneys for defendants-appellees.

Before WILLIAM H. BECKER*, WESLEY E. BROWN and HOMER THORNBERRY**, Judges.

WESLEY E. BROWN, Judge.

I. INTRODUCTION

Plaintiffs-Appellants, the City of Long Beach and the State of California, ("appellants"), brought suits in 1975 against seven major oil companies in California,[1] ("appellees"), alleging that appellees had engaged in an illegal price-fixing conspiracy in violation of the federal and state antitrust statutes and also that appellees breached the Contractors' Agreement. Appellants sought damages

---

*Judge William H. Becker filed a concurring opinion attached hereto.

**Judge Homer Thornberry filed a dissenting opinion attached hereto.

[1]The defendants-appellees are: Chevron Corporation (formerly Standard Oil Company of California), Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco, Inc., and Union Oil Company of California. The seventh defendant, Atlantic Richfield Company, settled with plaintiffs and was dismissed from these suits on December 13, 1984.

and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sections 15, 26, and under the Cal. Bus. & Prof. Code Secs. 16.700-16.758 (Cartwright Act), on the antitrust causes of action for revenues they allegedly lost during the period June 27, 1971 through December 31, 1977, as a result of the price-fixing conspiracy. Appellants also sought damages, accounting and injunctive relief on the breach of contract cause of action. Appellants made no allegations of jurisdiction pursuant to the Economic Stabilization Act of 1970,[2] in the Second Amended Complaint, nor did they contend in the District Court or in these consolidated appeals that appellees had violated the price control statutes or the implementing regulations promulgated thereunder. Indeed, appellants agree and the District Court so found that appellees had complied with the price control standards during the price control periods.

These consolidated appeals[3] by appellants are taken from an order of the District Court (July 17, 1984

---

[2]The Economic Stabilization Act of 1970 ("ESA"), *as amended*, 12 U.S.C. Sec. 1904 note, expired on April 30, 1974. Section 5 of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Sec. 754(a)(1), incorporated the judicial review provisions of Section 211 of the ESA. In 1975 Congress enacted the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871, 42 U.S.C. Sec. 6201, Note, which amended certain provisions of EPAA. *See Exxon Corp. v. Department of Energy*, 744 F.2d 98, 106-107 (TECA 1984).

[3]The procedural history of these consolidated appeals is no less convoluted than the complexity of the legal issues presented for review. Six case numbers (9-87, 9-88, 9-93, 9-94, 9-95 and 9-96) have been assigned by the Office of the Clerk of this Court since the District Court approved an order on December 13, 1984 allowing interlocutory appeals of its July 17, 1984 Memorandum of Decision to TECA and the Ninth Circuit Court of Appeals. *See In re: Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation,*

Memorandum of Decision) dismissing appellants' federal and state antitrust damage claims from April 12, 1972 to December 31, 1977. The District Court dismissed the antitrust damage claims on the basis that, assuming appellants could prove the alleged antecedent price-fixing conspiracy, they were nonetheless precluded from recovery of antitrust damages during this period to the extent that these claims were based upon crude oil prices in excess of federal price ceilings. The assumed predicate of an antecedent conspiracy, however, was dispelled subsequently by the District Court in its Memorandum of Decision of September 19, 1985, finding that appellants did not "have the evidence to prove the antitrust conspiracy." The District Court dismissed appellants' both federal and state antitrust causes of action in their entirety. Appellants' appeal of the District Court's final judgment of that dismissal is before the Ninth Circuit Court of Appeals and not before this Court. That appeal does not raise any issues which are within this Court's subject matter jurisdiction.

M.D.L. No. 150, 761 F.2d 710 (TECA 1985) and 788 F.2d 1571 (TECA 1986). By Order dated March 31, 1986, this Court dismissed Case Numbers 9-87, 9-93 and 9-94 without prejudice. Appellants refiled their appeals from the final orders of the District Court, to which two new numbers have been assigned, 9-95 and 9-96. No. 9-95 is an appeal from a consolidation of the *Long Beach Trust* case, Counts I and II of the Second Amended Complaint, and the *California* case, Fifth Cause of Action of the Second Amended Complaint. The *Long Beach Trust* case concerned crude oil produced from an oil field owned in trust by the City of Long Beach with the State as the beneficiary. The Fifth Cause of Action of the *California* case was severed from that case and consolidated with the *Long Beach Trust* case. No. 9-96 is an appeal from the *Long Beach Proprietary* case. It concerned crude oil produced from an oil field owned by the City of Long Beach in its proprietary capacity.

II. ISSUES ON APPEAL

The record before us discloses that appellants' concurrent appeals to TECA and the Ninth Circuit Court of Appeals from the July 17, 1984 Memorandum of Decision dismissing appellants' claims for antitrust damages asserted under Section 4 of the Clayton Act are still pending before the Ninth Circuit as well as before TECA. These two concurrent appeals raise the same issues as those which were originally certified by the District Court for review by TECA and the Ninth Circuit. Appellants have reasserted these issues in TECA Nos. 9-95 and 9-96, which may be cogently restated as follows:

A. Whether or not 6 C.F.R. Sec. 101.34(a)(2), which exempted state and local governments from price controls under certain circumstances, applied to sales of "net profits oil" by appellants during the periods April 12, 1972 to June 13, 1973, and August 19, 1973 to October 25, 1973?

B. Whether or not the operation of federal price controls either was the "effective reason" of the appellants' injury or acted to supplant Section 4 of the Clayton Act so as to deprive appellants of any legal rights to recover damages for the alleged antitrust violation by appellees?

C. Whether or not compliance with Phase III price controls was "voluntary" during the period of January 11, 1973 to June 13, 1973 so that appellees were not prohibited from making appropriate price adjustments for the crude oil sold by appellants during this period?

Appellants assert that the resolution of these issues is within the exclusive appellate jurisdiction of TECA and urge this Court to decide them upon the hypothesis that the allegation of an antecedent price-fixing conspiracy "be accepted as true on appeal." Appellants' Opening Brief,

at 4. Because it is not within our appellate jurisdiction to review the propriety of the standard used by the District Court in finding that there was no triable factual issue of a price-fixing conspiracy, we must decline to consider these appeals upon a premise which is contrary to that factual conclusion reached by the District Court. We believe that the constitutional limitation requires us not to exercise our judicial power in expressing legal opinions that are based upon hypothetical or academic facts. We also believe that a determination of the appropriate legal standard required of appellants to prove the causal connection between their claims of antitrust injury and of antitrust damages as provided under Section 4 of the Clayton Act,[4] is within the exclusive appellate jurisdiction of the Ninth Circuit Court of Appeals. For the reasons given below, we therefore dismiss these consolidated appeals, TECA Nos. 9-95 and 9-96, for lack of a real and substantial controversy as a requisite for invoking our limited appellate jurisdiction.

III. BACKGROUND

Because it is essential to an understanding of our decision, we will summarize the historical facts of these eleven-year-old cases and the rulings of the District Court which gave rise to the somewhat deformed posture of these appeals. Appellants have engaged in the production and sale of crude oil from the Wilmington Oil Field in

---

[4]The relevant portion of Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, provides that: "(a) . . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold of the damages by him sustained. . . ."

California. They sold that crude oil to appellees pursuant to contracts that contained no fixed price terms. Instead, appellants received from appellees sales revenues which were keyed to "posted prices" on various kinds and grades of crude oil set by some, but not all of the appellees. Appellants agreed that the "posting by purchasers of the prices to be paid for crude oil is customary in the petroleum industry." Appellants' Opening Brief, at 6.

The gravamen of appellants' claim was that appellees had engaged in a continuous price-fixing conspiracy, in violation of the Sherman Act and the California Cartwright Act, since 1961 to fix and maintain non-competitive "posted prices" on certain kinds and grades of California crude oil below those price levels which buyers in a free and open market would have paid. Appellees contended that on August 15, 1971 the Federal government imposed price ceilings on the purchase of crude oil based upon prices existing in early August 1971. Appellees argued that those price ceilings prevented increases in crude oil prices until the price controls were lifted. On this basis, appellees maintained that it was the Federal government which was the sole cause of the alleged underpricing of the crude oil sold by appellants.

Because price controls set a price ceiling based upon prices existing in the 30-day period preceding August 15, 1971, appellants contended that had appellees not engaged in a conspiracy to underprice the crude oil value in California, higher prices would have prevailed on August 15, 1971. Otherwise stated, appellants asserted that they would have received higher prices during the price-control periods had there not been an antecedent price-fixing conspiracy by appellees to fix those "posted prices." At the oral argument, appellants graphically illustrated that

their claims for damages were based upon calculations which measured the allegedly depressed, fixed price on which the price ceiling was actually based and the competitive market price which would otherwise have been used.

Appellees moved for partial summary judgment on appellants' antitrust claims for the period from August 15, 1971 to December 31, 1977. The District Court granted a judgment to appellees, dismissing appellants' antitrust claims during the periods between April 12, 1972 to October 1, 1976, and thereafter to the end of the damage period on the basis that appellants were not entitled to recover antitrust damages upon the claims for appropriate competitive prices that were in excess of the federal price ceilings. In reaching this conclusion, the District Court made three rulings which were contained in a Memorandum of Decision entered July 17, 1984. First, it held the price control regulation, 6 C.F.R. Sec. 101.34(a) (2), did not exempt the sale of "net profits oil" by the appellees from the price control programs. It found that this exemption regulation applied to sales of crude oil by a governmental entity "only if the selling governmental body has the unilateral right to adjust the price and would receive the entire benefit from such adjustment." Second, the District Court said:

> For the purposes of this decision, it is assumed, without in any manner deciding, that the prices for net profits oil received by Long Beach during the thirty-day period ending August 14, 1971, were set pursuant to conspiracy among the defendants. Once price controls were established, on August 15, 1971, Long Beach could not receive more for its oil than the ceiling allowed. From then until April 12, 1971, it could be argued with considerable logic that the

> defendants were legally responsible for the low ceiling, because it was based automatically upon the conspiratorially adopted prices.

The District Court. however, found that the legal relationships between the appellants and appellees changed on April 12, 1972, because of a letter dated April 12, 1972 from Louis Neeb of the United States Price Commission in which he declined a request by a California oil producers association for an across-the-board increase on the controlled California crude oil prices. The District Court concluded that the action taken by this "appropriate governmental body, in the exercise of its discretion . . . , supplanted the conspiracy as the effective reason for the level of the controlled prices." The litigants have characterized this ruling as the "Neeb issue." Third, the District Court accepted appellees' argument that the Phase III price control regulations, like those which prevailed in Phases II and IV, were mandatory legal standards which appellees were required to obey. The District Court found that appellees did comply with these mandatory price control requirements, and concluded that the operation of these regulations deprived appellants of the "legal right" to receive crude oil prices higher than those permitted by the Phase III price control standards.

We originally were asked to review the propriety of these three District Court rulings upon their certification to this Court in an interlocutory appeal. *See M.D.L. No. 150, supra,* 761 F.2d at 712; and ____ F.2d ____ (TECA No. 9-87, Order filed May 20, 1985). The District Court entered a Memorandum of Decision on September 19, 1985 upon appellees' motions for summary judgment that "would deny any and all recovery to the plaintiffs growing out of their allegations of conspiracy to depress the prices of crude oil paid by defendants to the plaintiffs." *M.D.L.*

No. 150, CV-75-2232-WPG, slip op. at 1 (C.D. Cal. Sept. 19, 1985). The District Court granted appellees' motions for summary judgment, dismissing appellants' federal and state antitrust causes of action upon two alternative bases. The District Court found that "any failure by the defendants to increase the prices that they paid Long Beach for its crude oil during the period" between June 27, 1971 and April 12, 1972 "was due to the effectiveness of (the Mandatory Oil Import Program) and not attributable to any conspiracy." *Id.,* at 8. The District Court also reviewed the evidence in support of the contentions on the merits of the appellants' antitrust causes of action. It found that years of discovery failed to yield any evidence to demonstrate a triable factual issue on the allegations of existence of an actionable price-fixing conspiracy. *Id.,* at 8-9. The District Court entered final judgment on March 17, 1986, decreeing that Counts I and II (Antitrust counts) of the Second Amended Complaint of the *Long Beach Trust* case, No. CV-75-2232-WPG, and the Fifth Cause of Action of the *California* case, No. CV-76-2839-WPG "be dismissed on their merits and with prejudice." The District Court also entered final judgment on April 1, 1986 on the *Long Beach Proprietary* case, CV-82-3252-WPG, dismissing appellants' action for antitrust violation "on the merits and with prejudice." Appellants have filed an appeal with the Ninth Circuit Court of Appeals, seeking a review of the District Court's September 19, 1985 order of dismissal.

IV. JURISDICTION

An appellate review of the propriety *vel non* of the District Court's conclusion that appellants failed to make out a triable factual issue on the allegations of an illegal price-fixing conspiracy is clearly within the exclusive

appellate jurisdiction of the Ninth Circuit Court of Appeals. *See Spinetti v. Atlantic Richfield Company,* 522 F.2d 1401 (TECA 1975). The Ninth Circuit, however, entered an order on October 29, 1986, directing that the briefing schedules on the appeals to that court be "stayed until TECA decides whether it has jurisdiction over the price ceiling issue, or for a period of six months, whichever occurs first." It appears that the Ninth Circuit believes that issues arising from the District Court order of July 17, 1984 are within the exclusive jurisdiction of this Court.

Section 211(b)(2) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. Sec. 1904 note, incorporated by reference in Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Sec. 754(a)(1), provided that TECA shall have "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." It is a fundamental principle that a court created under Article III of the United States Constitution always has the necessary jurisdiction to determine whether it has jurisdiction over the parties to and the subject matter of a case or controversy. *See United States v. United Mine Workers of America,* 330 U.S. 258, 290-92, 91 L.Ed. 884, 910-12 (1946). The scope of our inquiry, however, is itself limited by the requirement of an actual controversy which must exist at all stages of the appellate review. *Preiser v. Newkirk,* 422 U.S. 395, 401, 45 L.Ed.2d 272, 277-78 (1975). It is insufficient to satisfy the minimum constitutional requirement by alleging that a controversy may occur in the future or is contingent upon the happenstance of certain hypothetical events. Constitutional jurisprudence mandates that we refrain from rendering an opinion advising what the law would be upon a hypothetical set of facts that is not raised by a

justiciable controversy between parties whose interests are not actually affected by the virtual certainty from the operation of the interdicted law. *See North Carolina v. Rice,* 404 U.S. 244, 246, 30 L.Ed.2d 413, 415 (1971).

In the underlying litigation, appellants sought damages and injunctive relief upon the allegations that appellants had engaged in a price-fixing conspiracy, in violation of the applicable federal and state antitrust laws, and that they breached certain terms of the Contractors' Agreement. A final determination by the District Court concluding that appellants failed to make out a triable factual issue on their claims of existence of an illegal price-fixing conspiracy eliminated the hypothetical predicate of an illegal conspiracy by appellees which the District Court had assumed in reaching its rulings which were contained in the July 17, 1984 Memorandum of Decision.

The issues presented here concern the propriety of the District Court's determinations that appellants could not recover antitrust damages under Section 4 of the Clayton Act for the period from April 12, 1972 to the end of the damage period as a matter of law. The necessity for a review by an appellate court on the damages issues, however, depends upon appellants' success in establishing the existence of an illegal price-fixing conspiracy in violation of the applicable federal and state antitrust laws. The determination by the District Court that there was no material evidence to raise a triable factual issue of the allegations on an illegal price-fixing conspiracy is the subject of the appeal at issue before the Ninth Circuit Court of Appeals. Thus, until the litigants have exhausted their appeals to the Ninth Circuit and, if appropriate, to the Supreme Court on the propriety of the standard used by the District Court in dismissing appellants' antitrust

causes of action, there is no basis for the litigants to invoke our appellate jurisdiction. A fortiori, unless there has been an adjudication on the grounds upon which such antitrust liability would be imposed, a decision by this Court on any of the issues now before us of the propriety *vel non* of the District Court's rulings which were contained in the July 17, 1984 Memorandum of Decision would be purely theoretical and advisory. The requirement that there be a "case" or "controversy" as set out in Section 211(b)(2) of the ESA and Section 2, Article III of the United States Constitution prevents us from rendering any gratuitous advisory opinions.

We noted earlier that appellants filed two concurrent appeals with TECA and the Ninth Circuit Court of Appeals. These two appeals raise the same issues concerning the rulings of the District Court which were contained in the July 17, 1984 Memorandum of Decision. *See M.D.L. No. 150, supra,* 761 F.2d at 711. The record before us discloses that the appeal to the Ninth Circuit is still pending. We believe that a determination on the viability of the antitrust laws applicable to the allegations of the appellants in view of the enactment of price control statutes, i.e., ESA and EPAA, is within the exclusive appellate jurisdiction of the Ninth Circuit. In this connection, it is clear that the Ninth Circuit has the exclusive appellate jurisdiction to review the District Court's ruling of July 17, 1984 on the antitrust damages issue under Section 4 of the Clayton Act. We believe that such a determination on the antitrust damages issue, by analyzing it under the proper causation standard required of appellants to prove their claims of antitrust injury and of antitrust damages, would not involve any issues which require this Court's intervention in adjudicating these antitrust and breach of contract lawsuits.

It is not inconceivable that a decision by this Court at this time on the issues in the instant consolidated appeals could be rendered moot by the eventual outcome of the appeals to the Ninth Circuit. Until such time as the underlying antitrust liability has been resolved in a forum having the appropriate subject matter jurisdiction over the antitrust causes of action, we believe that the possibility and scope of appellants' right to damages, if any, remains to be crystallized.

Because the appellants request this Court to assume appellate jurisdiction over issues which are not now involved in a real and substantial controversy, we dismiss these consolidated appeals on the basis that they failed to satisfy the jurisdictional requirements provided by Section 211(b)(2) of the ESA, incorporated in 15 U.S.C. Sec. 754(a)(1).[5]

---

[5]We note that appellants' claims for breach of contract remain to be tried upon the District Court's interlocutory order denying appellees' motion for summary judgment on those claims. Appellants urge us to decide the issues now before us because they anticipate that the appellees would raise defenses similar to those asserted in their motions for partial summary judgment on the antitrust damages issues. We do not believe that there are issues in this litigation which fall within the "capable of repetition, yet evading review" doctrine. *See Weinstein v. Bradford*, 423 U.S. 147, 148, 46 L.Ed.2d 350, 352 (1975). For the reasons given in this Opinion, we decline to consider the appellants' request upon their prediction of what may or may not occur. However, if one or both of these appeals become justiciable under the principles set forth herein, counsel may on stipulation seek approval by this Court, or on order of this Court, provide for use of any part of the record or briefs heretofore filed herein.

V. ORDER

IT IS THEREFORE ORDERED that TECA No. 9-95 and TECA No. 9-96 be and are hereby DISMISSED WITHOUT PREJUDICE.

WILLIAM H. BECKER, Judge, Concurring:

Exclusive Jurisdiction Of This Court

The period of time when the alleged events complained of by the Plaintiff-Appellants occurred was from June 27, 1971 through December 31, 1977. During this time the Emergency Petroleum and Allocation Act of 1973 (EPAA) P.L. 93-159 and the succeeding Energy Policy and Conservation Act (EPCA) P.L. 94-163 were successively in effect. *Cf. Exxon Corporation et al. v. U.S. Department of Energy et al.* (TECA 1984), 744 F.2d 94. In the EPAA and the EPCA the United States District Courts were given continuing jurisdiction to entertain actions under Section 211 of the Economic Stabilization Act of 1970 (ESA). See the EPAA Section 5, 15 U.S.C. 754(a)(1) and the EPCA Section 523(4)(b), 42 U.S.C. 6393(b).

In these provisions the jurisdiction of the United States District Courts and the exclusive appellate jurisdiction of this Court provided in § 211 of the ESA were continued in effect under the EPAA and the EPCA, as noted above. *Cf.* 12 U.S.C. 1904 note.

Therefore this Emergency Court of Appeals (TECA) has exclusive jurisdiction of any appeal of justiciable issues arising under the EPAA or EPCA, as held in the earlier opinions of this Court allowing an interlocutory appeal, dismissing without prejudice interlocutory and subsequent appeals by Plaintiff-Appellants in this litigation. *In Re: Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* M.D.L. No. 150 (TECA 1985), 761 F.2d 710, allowing an interlocutory appeal followed by (TECA 1986), 788 F.2d 1571, dismissing without prejudice all appeals then pending.

Current Lack of Actual Justiciable Issues Within Exclusive Jurisdiction of this Court

The first question that arises is whether at this time, and in the current state of the record, we should exercise our exclusive jurisdiction or await the decision of the Ninth Circuit Court of Appeals on the contemporaneous appeal within the jurisdiction of the Ninth Circuit Court of Appeals.

I agree with the conclusion of the majority opinion that we should not exercise our jurisdiction at this time because of a lack of an appealable final judgment or appealable order (including an order generally moot, but capable of repetition yet evading review), within our exclusive jurisdiction: and because it is possible that no such appealable judgment or order on issues within our exclusive jurisdiction may ever exist (while also possible that it may exist). A general rule is not in order in this area because the facts in each case must be considered in making a ruling.

Nevertheless, in light of the dissent, the following comment is appropriate.

When contemporaneous concurrent ("bifurcated") appeals, from a final judgment or appealable order, are pending in the TECA and in a Court of Appeals of the United States, and present appealable issues (a) within the exclusive jurisdiction of this Court and (b) within the broader jurisdiction of the Court of Appeals, this Court should proceed first to decide the issue or issues within the exclusive jurisdiction of this Court, so that the Court of Appeals can thereafter proceed to decide finally the contemporaneous appeal within its general jurisdiction. *Cf. Longview Refining Company v. Shore* (TECA 1977), 554 F.2d 1006, *cert. denied*, 434 U.S. 836, 98 S.Ct. 126, 54

L.Ed.2d 98 (1977); *United States v. Cooper* (TECA 1973), approved in *Bray v. United States,* 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975), and similar later cases, such as *Wellven Inc. v. Gulf Oil Corporation* (TECA 1984), 731 F.2d 892.

Application of this order of decision answers all the problems of manageability of contemporaneous "bifurcated" appeals to the TECA and the Court of Appeals discussed in the opinion in *Coastal States Marketing v. New England Petroleum Corporation* (CA.A.2 1979), 604 F.2d 178, the problem and suggestion in note 10 of that opinion at page 187 of 604 F.2d, *supra,* and is consistent with the prior decisions of this Court.

And for these and the reasons given in the majority opinion, I concur in the majority opinion.

Some Additional Reasons for Lack of Agreement With the Dissenting Opinion

Having agreed with the majority opinion that the appeals to this Court should be dismissed without prejudice, agreement or disagreement with any of the substantive conclusions of the dissenting opinion is not in order. But it is noted that many of the factual assumptions, the conclusions and reasons of the dissenting opinion remain to be considered by this Court, when and if they may be lawfully decided by this Court in the future.

This appeal presents to this Court an unusual question of jurisdiction, properly decided at this time in the majority opinion on principles of Constitutional, statutory and jurisprudential law, often expressed in concepts of actual justiciable controversy, justiciability, finality, mootness, and standing of appellant. *Cf. 20 Am.Jur.2d* Courts §§ 80 and 81, and cases cited in the notes, annotations and Law Reviews cited therein.

The precise question is presented by concurrent appeals from the judgment of the District Court of the United States and to a Circuit Court of Appeals of the United States and to this Temporary Emergency Court of Appeals of the United States (TECA). The judgment of the District Court appealed from can be affirmed on an issue or issues within the general appellate jurisdiction of the Court of Appeals of the United States, which makes the issue within the exclusive unique jurisdiction of this Court (TECA), irrelevant, moot (in the general sense) lacking in justiciability and standing of appellant required for appellate review by this Court of the issue within its exclusive jurisdiction. Often it is obvious in concurrent appeals to the Court of Appeals and this Court that a decision on the subject of appeal to this Court is necessary to a final decision by the Court of Appeals. In these circumstances this Court proceeds to the decision on the issue or issues within its exclusive jurisdiction, inextricably or apparently intertwined with the disposition of the appeal to the Court of Appeals. *Cf. Longview Refining Company v. Shore, supra* (TECA 1977), 554 F.2d 1006, *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977), and similar later cases. But these are not the circumstances of these concurrent appeals to the Court of Appeals of the United States and to this Court (TECA).

It is conceivable that the decision of the Court of Appeals of the United States in the concurrent appeal may affirm the judgment of the District Court on an issue or issues that make a decision on the question within the exclusive jurisdiction of this Court, lacking in justiciability, generally moot, irrelevant, and the position of appellant in this Court lacking in standing. In those circumstances it would be unconstitutional and unlawful under controlling decisions for this Court to render an appellate decision, on the presently unrealized hypothesis

that the decision by the Court of Appeals would render a decision on a question or questions within the exclusive jurisdiction of this Court necessary and lawful. On the mootness and the Constitutional basis for the doctrine, see 2 *Federal Procedure,* Lawyers Edition, § 3.617, pages 588-589, and § 3.618, pages 588-590, in which it is stated:

> A federal appellate court has no power to determine the merits of a question which has become moot. This prohibition is based on the requirement of Article III of the Constitution, which provides that the judicial power of the United States shall extend only to cases and controversies. Consequently, a federal appellate court cannot decide a moot question, because a decision on a moot question constitutes an advisory opinion, given in an abstract context, which cannot affect the rights of the litigants in the case before the court. Instead, review is only permitted where the judgment of the appellate court will have some material effect, will resolve a real and substantial controversy between adverse parties, and will result in the granting of relief. However, even though an appeal might not have an immediate effect on the parties, it is not moot if a party will eventually suffer prejudice if the decision below is not reversed. (Notes, footnotes citing authorities, and § 3.619 on "Capable of repetition, yet evades review" exception omitted.)

This appeal falls in none of the exceptions to the rule of mootness. Brilmayer, *The Jurisprudence of Article III; Perspectives on the "Case or Controversy" Requirement,* 93 Harvard Law Review 297 (1979).

The controlling decisions supporting these conclusions are ably set out in the majority opinion. To that excellent opinion are added the following additional statements and authorities.

In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, after holding in Part IV-A that the case of Jane Roe presented a justiciable controversy on appeal, and before holding that the case of Dr. Halford did not present a justiciable controversy, the Supreme Court of the United States in Part IV-B stated at page 125 of 410 U.S.:

> The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date an action is initiated. United States v. Munsingwear, Inc., 340 U.S. 36, 95 L.Ed. 36, 71 S.Ct. 104 (1950); Golden v. Zwickler, supra: SEC v. Medical Committee for Human Rights, 404 U.S. 403, 36 L.Ed.2d 560, 92 S.Ct. 577 (1972).

Under that last controlling decision the Supreme Court of the United States, the relevant questions of justiciability, standing, finality and general mootness, and ultimately of existence of a Constitutional case or controversy must be determined as of the time of submission of the appeal, not at some earlier time of the controversy that existed when the action was being litigated in the District Court. *Roe v. Wade, supra,* 410 U.S. at page 125.

Applying this principle in this appeal to construction of Article III of the Constitution of the United States relating to cases or controversies and to the related questions of justiciability, finality, general mootness, standing and appealability, the majority opinion properly concludes to dismiss this appeal without prejudice.

If the Court of Appeals decides the questions within its jurisdiction in a manner to render the decision on this appeal to this Court unnecessary or undesirable under the law, the appeal to this Court remains ineffective.

If on the other hand, the Court of Appeals decides the issues that are the subjects of appeal to that Court in a manner that makes necessary a decision by this Court on an issue or issues within its exclusive jurisdiction, the Court of Appeals can decide whether to render a judgment subject to the decision of this Court on issues within its exclusive jurisdiction, or withhold final judgment of the Court of Appeals until this Court decides the issues within its exclusive jurisdiction.

To save time and expense, if an issue or issues within the exclusive jurisdiction of this Court become appealable, then an appellant or appellants can again appeal and move that submission of the new appeal or appeals on issues presently dismissed without prejudice be entertained on the basis of the record and current relevant supplemental records and briefs, as may be necessary or desirable.

HOMER THORNBERRY, Judge, Dissenting:

Plaintiffs appeal final judgments dismissing their antitrust claims. *In re Coordinated Pretrial Proceedings,* M.D.L. No. 150 (C.D. Cal. March 17, 1986) (Rule 54(b) final judgment dismissing antitrust counts in both CV 75-2232 and CV 76-2839); *Long Beach v. Standard Oil Company,* CV 82-3252 (C.D. Cal. April 1, 1986) (final judgment dismissing case). As explained in its September 19, 1985, memorandum decision, the district court rendered judgment based on two alternative holdings. *See In re Coordinated Pretrial Proceedings,* M.D.L. No. 150 slip op. at 8-9 (C.D. Cal. Sept. 19, 1985) (memorandum of decision explaining summary judgment on all antitrust claims). In the first holding, the district court examined the impact of three federal programs: the Mandatory Oil Import Program ("MOIP"), federal price controls, and the entitlements program. It concluded that those three

programs collectively precluded plaintiffs from recovering antitrust damages on the basis that defendants conspired to depress the price of their oil. *See id.* at 2-8; *see also In re Coordinated Pretrial Proceedings,* M.D.L. No. 150 (C.D. Cal. July 17, 1984) (price controls partial summary judgment): *In re Coordinated Pretrial Proceedings,* M.D.L. No. 150 (C.D. Cal. Dec. 13, 1984) (entitlements program partial summary judgment). In the second holding, the district court concluded that after eight years of discovery, plaintiffs had no proof of any antitrust conspiracy. *See In re Coordinated Pretrial Proceedings,* M.D.L. No. 150 slip op. at 8-9 (C.D. Cal. Sept. 19, 1985) (memorandum of decision explaining summary judgment on all antitrust claims).

Plaintiffs raise three issues on appeal: the Neeb issue, the exemption issue, and the Phase III issue. *See supra* p. 5 (issues B, A, and C respectively). Those three issues arise only in the context of the district court's price controls ruling, which forms part of its MOIP-price controls-entitlements program holding. The majority dismisses plaintiffs' appeal without prejudice because, in its words,

> [a] final determination by the District Court concluding that appellants failed to make out a triable factual issue on their claims of existence of an illegal price-fixing conspiracy eliminated the hypothetical predicate of an illegal conspiracy by appellees which the District Court had assumed in reaching its rulings which were contained in the July 17, 1984 Memorandum of Decision.

Supra p. 13. I agree with the majority that the Neeb issue, *see supra* p. 5 (issue B), is no longer a live issue in the case. I disagree, however, with the majority's determina-

tion that we have no jurisdiction to decide the exemption and Phase III issues.

In its original price controls ruling, the district court assumed that defendants' conspiracy caused the price controls to be lower than they would have been absent the conspiracy. *In re Coordinated Pretrial Proceedings,* M.D.L. No. 150 slip op. at 7-8 (C.D. Cal. July 17, 1984) (price controls partial summary judgment). The Neeb issue then was whether the district court correctly assessed the effect of federal price controls on defendants' antitrust liability — that is, whether Mr. Neeb's letter cut off defendants' liability for their antecedent conspiracy. *See supra* p. 5 (issue B). The final judgments defendants now appeal no longer present the Neeb issue. The district court's MOIP ruling in its September 19, 1985, memorandum of decision destroyed the factual predicate for the Neeb issue. *See In re Coordinated Pretrial Proceedings,* M.D.L. No. 150 slip op. at 2-8 (C.D. Cal. Sept. 19, 1985) (memorandum of decision explaining summary judgment on all antitrust claims). The Neeb issue assumed an antecedent antitrust conspiracy. By holding that the MOIP rather than defendants' conspiracy caused the allegedly low price of California crude when price controls took effect, the district court erased its earlier assumption that defendants' conspiracy caused lower price ceilings. The MOIP ruling therefore destroyed the underlying assumption of the Neeb issue. I agree with the majority that these appeals no longer present the Neeb issue, *see supra* p. 5 (issue B).

The majority, however, misses the distinction between the Neeb issue and the two other ESA issues. In not recognizing jurisdiction to decide the exemption and Phase III issues, *see supra* p. 5 (issues A and C respectively), the majority opinion ignores the district court's language in its September 19, 1985, memorandum decision. The district court based its decision on two *alternative* holdings, one of which necessarily decided two ESA issues and one of which involved no ESA issues. The district court stated:

> The foregoing [(the MOIP-price controls-entitlements program ruling)] is believed to provide a mandate for summary judgment for the defendants on the antitrust issues. However, in consideration of the possibility that higher authority might disagree, I shall devote the remainder of this memorandum to a discussion of my *alternative* reason for granting summary judgment: After more than eight years of discovery, the plaintiffs simply do not have the evidence to prove the antitrust conspiracy they allege.

See In re Coordinated Pretrial Proceedings, M.D.L. No. 150 slip op. at 8-9 (C.D. Cal. Sept. 19, 1985) memorandum of decision explaining summary judgment on all antitrust claims) (emphasis added). Even though the district court's first holding no longer decided the Neeb issue, it still necessarily decided both the exemption and the Phase III issues. The district court did not suddenly retract that first holding, which was based on the three federal programs, when it articulated its *alternative* holding, which was based on lack of evidence. In fact, the district court set forth its alternative holding in case an appellate court reversed its MOIP-price controls-entitlements program holding.

Assume that the TECA did not exist and that plaintiffs had appealed on all issues to the Ninth Circuit. In that case, the Ninth Circuit could have decided the case by affirming the district court on the basis of the MOIP-price controls-entitlements program holding, without ever deciding whether there was sufficient evidence of an antitrust conspiracy. In other words, the Ninth Circuit could have affirmed the district court on the basis that plaintiffs are not entitled to antitrust damages as a matter of law without regard to whether there was any antitrust conspiracy. Under the majority's holding, the Ninth Circuit cannot decide the case on that basis because the TECA will not decide the ESA issues in the district court's first holding until at least the Ninth Circuit has decided that the district court erred in its second (lack of evidence) holding.

The majority refuses to decide the ESA issues because the Ninth Circuit may affirm the district court's second (lack of evidence) holding and thus moot the ESA issues in the district court's first holding. The same concern arises, however, in any case sustained by two alternative holdings, only one of which involves ESA issues. The Second Circuit foresaw this problem in *Coastal States Marketing v. New England Petroleum Corp.*:

> We note, but do not resolve, the problem that might be posed by a district court adjudication in favor of a defendant that is alternatively rested on both ESA and non-ESA grounds. If appeals are noticed to both a court of appeals and the TECA, the choice of an appropriate initial appellate route might be influenced by a determination of whether appellate resolution of ESA issues is to be encouraged in the interests of promoting certainty concerning a complex regulatory scheme, or discouraged in the man-

> ner that resolution of constitutional issues is disfavored if non-constitutional grounds are available. The former approach suggests initial consideration by the TECA, with the court of appeals staying its appeal to await the TECA determination of the ESA issue. The latter approach suggests a stay of the TECA appeal, pending court of appeals resolution of the non-ESA issue.

604 F.2d 179, 187 n.10 (2d Cir. 1979). The Second Circuit never considered the possibility that an alternative, yet sufficient, basis for the district court's decision might altogether deprive the TECA of jurisdiction over ESA issues in the other holding.

Dismissal by the TECA is not appropriate unless another court of appeals has already mooted the ESA issues. The district court decided the exemption and Phase III issues, and that brings those issues within the jurisdiction of the TECA. *Texaco, Inc. v. Department of Energy,* 616 F.2d 1193, 1198 (Temp. Emer. Ct. App. 1979). That the Ninth Circuit may later moot those ESA issues does not preclude us from reviewing and deciding them now. Were that the case, the Ninth Circuit could say with equal logic that it could not review the second (lack of evidence) holding because a subsequent TECA decision might render that second holding moot. In other words, the Ninth Circuit could say that the sufficiency of the evidence issue in the second holding is hypothetical because the first holding may preclude recovery as a matter of law. Either the first (MOIP-price controls-entitlements program) holding or the second (lack of evidence) holding is sufficient alone, yet neither is necessary to sustain the judgment. The Ninth Circuit has already stayed its consideration of plaintiffs' appeal pending a decision from this court. Speedy resolution of the

ESA issues would allow the Ninth Circuit to resolve the entire case as quickly as possible on the basis of either the first (MOIP-price controls-entitlements program) or the second (insufficient evidence) holding, whichever it deems more appropriate. Therefore, I dissent from the majority opinion because I would review and decide the exemption and Phase III issues.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MDL DOCKET NO. 150 WPG
LONG BEACH: CV 75-2232-WPG

MEMORANDUM OF DECISION ON DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT BASED UPON FEDERAL PRICE CEILINGS

Following the hearing concerning the above-entitled matter, on April 26, 1984, and June 20, 1984, I have read the transcripts, given renewed consideration to the briefs, and have reread several of the cases cited therein. In light thereof, this court concludes that, as a matter of law:

(a) The plaintiffs, Long Beach and the State of California, were not exempt from any of the federally imposed price controls with respect to their "net profits" sales of crude oil to the defendants.

(b) Such exemption as did exist pertained only to "sell-off" and "in-kind royalty" oil.

(c) Irrespective of any conspiratorial conduct on the part of the defendants that the plaintiffs may establish, the defendants' failure, after April 12, 1972, to pay above ceiling prices cannot be a basis for antitrust damages.

The proposed Findings and Conclusions submitted by the defendants (exclusive of paragraphs 84 through 105) include facts and legal conclusions upon which this court's determination is based. Although such Findings are somewhat more detailed than necessary for my deci-

sion, I believe them to be correct. Accordingly, after minor editing, I adopt them as my own rather than undertaking to make completely new Findings that would substantially be duplicative. A few supplemental comments are added here.

I. THE PRICE CONTROL REGULATIONS DID NOT EXEMPT THE "NET PROFITS" OIL SOLD BY LONG BEACH TO THE DEFENDANTS PURSUANT TO THE CONTRACTORS' AGREEMENT.

A. The wording of the regulations, themselves, calls for interpretation in considering the applicability of the exemption to net profits oil. 6 C.F.R. 101.34(a)(2), which was in effect during Phase II of the price control program, was similar in text to the later regulations. It provided for the exemption from price controls of:

> Price adjustments . . . by State and local governments for any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, facilities, materials, or similar thing of value or utility transferred . . .

Those words, in themselves, do seem to cover "Price adjustments . . . for materials [crude oil] . . . transferred . . ." by Long Beach. However, the principal thrust of the regulation appears to be to avoid interfering with what a government may charge or assess in its taxing or licensing programs or for its normal governmental services. It would seem very doubtful that the exemption was intended to cover sales of crude oil by Long Beach as one of many producers and sellers of oil in the marketplace where other producers clearly were subject to price controls.

Also, "Price adjustments . . . by State and local governments . . ." implies that the adjustments concerned are those that could be made by the government unilaterally in its discretion. Here, Long Beach lacks such authority with respect to its net profits oil. In addition, the text of the regulation does not reveal its applicability if the governmental body would not be entitled to receive and retain the full benefit of any "price adjustment".

In view of the foregoing, I find that the regulation, in itself, fails to express clearly its applicability to the issue here presented, and that therefore it is appropriate to consider the contemporary expressions and actions by the parties concerned as to whether sales of net profits oil were exempt from price controls.

B. The successive governmental price control agencies considered the sales of net profits oil not to be exempt. Although there appears to have been no document specifically proclaiming that net profits oil was subject to price controls, the following factors establish quite clearly that this was the official interpretation of the regulation:

1. The lament by Long Beach that the "unfair" price controls were ". . . costing California and the City of Long Beach $25,000,000 in the Wilmington Oil Field alone, . . ." went unheeded by the price control authorities. If the official policy had been that Long Beach could charge what it wished for its net profits oil, an acknowledgment of that fact could reasonably have been expected.

2. The FEO, in its notice of intention to remove the exemption of "sell-off" oil from price controls, asserted that it "does not believe that the relatively small quantities of crude oil that are involved at present provide a sufficient basis for continuing the exemption . . ." This

shows an awareness that the much greater quantity of net profits oil would remain under price controls.

3. The memorandum of Mr. Carson, of the FEO staff, dated March 15, 1974 (defendants' Exhibit 164), distinguished between "working interest [net profits] oil" and royalty oil and considered the former to be under price controls.

4. The deposition testimony of Mr. Neeb and the affidavits of Mr. Walker and Mr. Buchanan serve to confirm the foregoing indications that the policy of the government was not to exempt from price controls oil belonging to a state entity unless the owner could adjust the prices unilaterally and would receive the entire benefit from such adjustment.

C. The officials of California and the City of Long Beach considered the sales of net profits oil not to be exempt, as shown by:

1. The resolution of the City Council of Long Beach, dated March 20, 1973 (defendants' Exhibit 89), complaining that ". . . the Cost of Living Council has recently frozen crude oil prices, including Wilmington crude oil prices, at their present levels", and asking that such ceiling be removed.

2. The night letter from Mr. Kenneth Cory to the CLC, dated July 30, 1973 (defendants' Exhibit 132), in which he asserted that the contemplated Phase IV regulations would freeze crude oil prices payable to the State of California, and asked that the gravity differential for ceiling price purposes be reduced to two cents per degree.

3. The active cooperation extended by Long Beach officials in supporting Mr. Buchanan's request for a ruling that sell-off oil would be exempt from price controls, and in confirming his assertion that all benefits therefrom

would go exclusively to Long Beach (defendants' Exhibits 30 and 32). This gives further strength to Mr. Buchanan's assertion in his affidavit that Long Beach officials were aware of the conditions that had to be fulfilled in order for the desired exemption to apply.

4. The requests on behalf of the State of California for a ruling that sell-off oil would be exempt from price controls (defendants' Exhibits 83, 130 and 138). Such requests made no mention of net profits oil, and thus they must have stemmed from an awareness that net profits oil was subject to such controls.

5. Mr. Flournoy's letter to the CLC, dated November 15, 1973 (defendants' Exhibit 152), opposing withdrawal of the price control exemption with respect to royalty oil and pointing out that the small amount of oil involved, 27,000 barrels per day, "... would have little or no effect on either the economy of the United States or on any crude oil allocation program."

D. The letters by Mr. Walker to Mr. Lamont, dated September 6, 1973 (defendants' Exhibit 140), and to Mr. Shavelson, dated October 26, 1973 (plaintiffs' Exhibit 16), do not overcome the above asserted conclusion that sales of Long Beach's net profits oil were not exempt from price controls. Mr. Walker, in his letters, does make the unqualified assertion that "Sales of... crude petroleum ... by a state or local government are exempt" (plaintiffs' Exhibit 16), and that "... sales by the State of California of crude oil owned by the State falls within the exemption in Section 150.54(a)(2)." (Defendants' Exhibit 140). However, these letters clearly were in response to specific inquiries regarding sell-off oil. This is apparent from Mr. Shavelson's letter to Mr. Walker, dated September 17, 1973 (defendants' Exhibit 141, in which he requested a letter regarding "... royalty oil to be taken in kind by the

State . . . at your very earliest convenience." Upon receipt of their respective letters from Mr. Walker, California and Long Beach officials specifically referred to them as applying to sell-off oil (Exhibit 87 to deposition of William F. Northrup of September 24, 1973, and letter from John R. Mansell, City Manager of Long Beach, to the Mayor). Mr. Lingle, a deputy city attorney of Long Beach concerned with the City's sales of oil, believed, as of November 16, 1973, that the exemption was only applicable to sell-off oil. This was long after the Walker letter was received (Lingle deposition of August 18, 1981, page 885).

E. Conclusion. From all of the foregoing, as well as other evidentiary factors submitted at the hearings that are not discussed here, this court concludes that:

1. Sales of crude oil by a state or local government came within the subject price control exemption only if the selling governmental body had the unilateral right to adjust the price and would receive the entire benefit from any such adjustment.

2. Sales of net profits oil did not meet these conditions and therefore were not exempt from price controls.

II. THE PLAINTIFFS MAY NOT RECOVER ANTITRUST DAMAGES BASED UPON THE FAILURE OF THE DEFENDANTS TO PAY ABOVE CEILING PRICES.

For purposes of this decision, it is assumed, without in any manner deciding, that the prices for net profits oil received by Long Beach during the thirty-day period ending August 14, 1971, were set pursuant to conspiracy among the defendants. Once price controls were established, on August 15, 1971, Long Beach could not receive more for its oil than the ceiling allowed. From then until

April 12, 1972, it could be argued with considerable logic that the defendants were legally responsible for the low ceiling, because it was based automatically upon the conspiratorially adopted prices. However, on the latter date the Price Commission, after considering the arguments for a price increase urged on behalf of the California oil producers, refused to increase the ceiling to "correct economic balance." Thereafter, the ceiling remained because the appropriate governmental body, in the exercise of its discretion, determined that it should remain. Such action, whether fair and enlightened or not, supplanted the conspiracy as the effective reason for the level of the controlled prices.

In *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163 (1922), Mr. Justice Brandeis said that the antitrust laws "... give[s] a right of action to one who has been 'injured in his business or property.' Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." Similarly in the present case, the legal rights of Long Beach as against the defendants with respect to prices that may be charged and received are measured by the pertinent price controls, and they cannot be enlarged by the tort of the defendants.

At the April 26, 1984, hearing in these proceedings, Mr. Hoecker relied heavily upon his assertion that "if in fact the defendants had not conspired, the price would have been higher." This presumably is true. It also presumably was true in *Keogh* that if the defendants had not con-

spired, the rates that the plaintiff was obliged to pay would have been lower. It likewise was presumably true in *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.*, 214 F. 2d 413 (5th Cir. 1954), that if the defendants had not conspired, the plaintiff would have been granted a permit to string its power lines along the critical roadway. Similarly, in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), if the defendants had not conspired, the minimum wages that the plaintiff was obliged to pay probably would have been lower.

Mr. Hoecker undertakes to distinguish the above-mentioned cases from the present one by pointing out that "In each and every one of those cases it was the government's act that caused the injury. In this case . . . it was the defendants' conduct that caused the act." (Hearing transcript of April 26, 1984, page 317). He contends that Long Beach's injury was caused by the conspiracy, not by the government, and that the government's only participation was in failing to relieve the plaintiffs' injury by increasing the ceiling. (Hearing transcript of April 26, 1984, page 320). I am unable to see significance in such a distinction. In each of the cited cases, the action by the governmental body prevented the plaintiff from asserting against the defendants a "legal right" cognizable under the antitrust laws. The same is true here. The legal rights of Long Beach, as defined by the price controls, "cannot be varied or enlarged by either contract or tort . . ." of the present defendants. (*See Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 at 163 (1922)).

The plaintiffs point out that the defendants are seeking to avoid damages attributable to their failure to pay above price ceilings that they were instrumental in setting. The plaintiffs assert that such a result would be unfair to the

plaintiffs and allow the defendants to keep their "ill-gotten gains". This may be true. But price controls are inherently arbitrary, and, in pursuing the goal of controlling inflation, they inevitably operate unfairly in many situations. To the extent that the plaintiffs received ceiling prices from the defendants, they were paid all that the law allowed, whether or not the result be equitable. To the extent that the defendants paid ceiling prices, they paid all that the law allowed and may not be obliged to pay more, whether or not the result be equitable.

III.
CONCLUSION.

It is my understanding that the defendants paid ceiling prices for net profits oil during the entire period between April 12, 1972, and October 1, 1976. Under such assumption, the defendants will be entitled to summary judgment dismissing the plaintiffs' damage claims covering sales during that period. Such claim also will be dismissed for the period between October 1, 1976, and the end of the damage period, to the extent that the claimed appropriate competitive price exceeded the increased ceiling.

DATED: July 17, 1984.

/s/ WILLIAM P. GRAY
WILLIAM P. GRAY
U.S. District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

CASE NUMBER MDL DOCKET NO. 150 WPG
CV 84-2232-WPG LONG BEACH

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that MEMORANDUM FOR DECISION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW in the above entitled case was entered in the docket on 7-19-84.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties). Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action, hereby certify that on July 19, 1984, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Gary W. Hoecker, Esq.
Hoecker & McMahon
612 South Flower Street
Suite 800
Los Angeles, CA 90017

Ronald Charles Redcay, Esq.
Hughes, Hubbard & Reed
555 South Flower Street
Suite 3700
Los Angeles, CA 90071

Michael I. Spiegel, Esq.
Deputy Attorney General
State of California
350 McAllister Street
Room 6000
San Francisco, CA 94102

CLERK, U.S. DISTRICT COURT

By CONNIE YANDALL
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MDL DOCKET NO. 150 WPG

LONG BEACH: CV 75-2232-WPG

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF PARTIAL SUMMARY JUDGMENT BASED UPON FEDERAL PRICE CEILINGS AND THE ENTITLEMENTS PROGRAM

Entered July 19, 1984.

The Court, having considered defendants' Motion For Partial Summary Judgment Based Upon Federal Price Ceilings And The Entitlements Program, the memoranda, affidavits, deposition testimony and exhibits filed by the parties in connection therewith, having heard oral argument and having determined that there are no genuine issues of material fact, now finds as follows:

FINDINGS OF FACT

The Parties

1. Plaintiff City of Long Beach is the owner, upon certain trusts and conditions, of the tide lands and submerged lands, both filled and unfilled, conveyed to it by the State of California by Chapter 676, Statutes of

1911, Chapter 102, Statutes of 1925, and Chapter 158, Statutes of 1935 (the "Long Beach Tidelands").

2. Plaintiff State of California is the beneficial owner of the above described lands held in trust by the City of Long Beach pursuant to said statutes. In addition, the State of California is the owner of various crude oil producing lands including tide lands and submerged lands from which it receives revenues as a result of the production of crude oil.

3. Defendants Atlantic Richfield Company ("Atlantic Richfield"), Exxon Corporation ("Exxon"), Mobil Oil Corporation ("Mobil"), Shell Oil Company ("Shell"), Standard Oil Company of California ("Socal"), Texaco, Inc. ("Texaco") and Union Oil Company of California ("Union") are corporations doing business within the State of California.

4. Defendant Thums Long Beach Company is a corporation doing business within the State of California and was formed and is wholly owned by defendants Texaco, Exxon, Union, Mobil and Shell.

Federal Price Ceilings

Phase I: August 15, 1971, through November 13, 1971.

5. In 1970, Congress enacted the Economic Stabilization Act of 1970, Pub. L. 91-379 (1970), which authorized the President to stabilize prices, rents, wages and salaries at levels not less than those existing in May 1970.

6. On August 15, 1971, President Nixon announced his new economic policy, which included a ninety-day freeze of all prices, rents, wages and salaries. The Phase I Freeze froze prices of all commodities, including crude oil, at the highest level at which the seller made at least

ten percent of its sales during the thirty day period ending August 14, 1971, or, alternatively, with respect to any class of purchaser, the average price received by the seller on May 25, 1970, or if no such transaction occurred on May 25, 1970, the nearest preceding date.

7. Plaintiffs Long Beach and California received for all the crude oil they sold during Phase I the highest prices the Freeze permitted them to receive.

8. The federal government intended Phase I to freeze prices, including crude oil prices, at the existing levels even if those levels were inequitable or non-competitive.

Phase II: November 14, 1971, through January 10, 1973.

9. By Executive Order No. 11627, President Nixon continued the Economic Stabilization Program under a new structure and new regulations, which were known as Phase II. Phase II controlled prices throughout the economy from November 14, 1971, through January 10, 1973.

10. The Phase II regulations precluded a person from "charging a price with respect to any sale * * * which exceed[ed] the base price" unless the regulations authorized a higher price. The Phase II base price essentially was the same as the Phase I base price.

11. The regulations permitted a crude oil producer, which they classified as a "manufacturer," to "charge a price in excess of the base price only to reflect increases in allowable costs * * * reduced to reflect productivity gains and only to the extent that the increased price [did] not result in an increase in its profit margin over that which prevailed during the base period." Moreover, the regulations authorized the Price Commission not to permit otherwise qualifying price increases that were

inconsistent with the goal of the program to hold inflation to a rate of no more than 2½ percent per year.

12. The Phase II regulations permitted Price Category I firms, which were firms with annual sales or revenues of $100 million or more, to increase prices only after they submitted a prenotification form to the Price Commission and the Price Commission had either approved the increase or permitted it to take effect.

13. The Phase II regulations also required Price Category I firms and Price Category II firms, which were firms with annual sales or revenues between $50 million and $100 million, to submit quarterly and annual reports. Price Category I and Price Category II firms were not permitted to increase prices if they failed to submit required reports.

14. The Price Commission applied the Phase II regulations to freeze crude oil prices. The Price Commission used term limit pricing agreements with the major companies to prevent increases in crude oil prices.

15. The Price Commission froze crude oil prices during Phase II by, in part, refusing producers' requests for across-the-board increases in crude oil prices and, instead, insisting that each producer individually apply for an exception or justify any increase based upon its own costs and profit margin and, in the case of a Price Category I firm, only after prenotification.

16. The Price Commission rejected requests by California crude oil producers for higher California crude oil prices based upon the argument that the California price gravity differential was too large, because it decided that such requests were inconsistent with the Price Commission's function "to control inflation by controlling price increases." The Price Commission considered that the

California producers' arguments regarding the alleged inappropriateness of existing California prices as price ceilings "missed the point of the program" and were "irrelevant to the Price Commission's inflation fighting mission."

17. The Phase II price control regulations applied to plaintiffs Long Beach's and California's sales of crude oil, except that those regulations permitted them to make exempt price adjustments for sell-off oil.

18. The Phase II exemption of price adjustments by state and local governments applied only to new prices and price adjustments that a governmental entity was contractually permitted to make and as to which the entire benefit incurred to the benefit of the governmental entity.

19. The efforts to obtain the Internal Revenue Service's June 9, 1972, ruling that the Phase II exemption applied to the 1971 sell-off of crude oil pursuant to Article 11 of the Tract 1 Contractors' Agreement demonstrated the plaintiffs' awareness that the exemption was limited to sell-off oil. The ruling was premised on, among other facts, that (1) the sell-off constituted a sale of crude oil by Long Beach, through the Field Contractor as its agent, at a price established by competitive bidding, and (2) the Field Contractor was required to pay to Long Beach the entire amount of the sell-off bonuses and hence no benefit of the increased prices paid by the sell-off purchasers incurred to any private companies.

20. Long Beach's and California's sales of net profits oil (*i.e.*, non sell-off oil) to the contractors pursuant to the Tract 1 Contractors' Agreement, the Tract 2 Agreement, the 1947 and 1972 Parcel A Contracts and the LBOD Contract satisfied neither of the two conditions of the

Phase II exemption (or of the Phases III and IV exemptions).

a. Since these contracts are long term contracts that required Long Beach and California to sell the crude oil at prices determined by pricing formulas, Long Beach and California had no right to adjust unilaterally the prices.

b. Since these contracts permitted the contractors to share the net profits, the contractors would have shared the benefits of any price increase.

21. Long Beach entered into contracts with the sell-off purchasers that did not permit it to adjust the prices further. While the Phase II exemption permitted Long Beach to receive the bonuses for the Tract 1 sell-off oil that it received pursuant to competitive bidding, the exemption did not permit Long Beach to receive any more for the sell-off oil above the Phase II ceiling price than these bonuses, which were the full exempt price adjustments that Long Beach had made.

22. Royalties paid for the crude oil produced pursuant to leases between the State of California and the City of Long Beach and their lessees that do not permit California or Long Beach to adjust unilaterally the amount of the royalty paid did not satisfy the first condition of the Phase II exemption (or of the Phases III and IV exemptions) and thus were not exempt.

23. Prices paid under sales contracts between Long Beach and its purchasers that committed Long Beach to sell crude oil at a price that it could not unilaterally adjust also did not satisfy the first condition of the Phase II exemption (or the Phases III and IV exemptions) and thus were not exempt.

24. Long Beach and California received the Phase II base price for all their sales of crude oil during Phase II (except for sales of Tract 1 sell-off oil, for which Long Beach received the bonuses plus the Phase II base price).

25. The Phase II regulations did not permit Long Beach and California to receive higher prices than they in fact received for their sales of crude oil.

26. The Phase II regulations did not entitle Long Beach and California (for trust properties) to receive a higher price for sales of crude oil because Long Beach never complied with the prenotification requirements.

a. Long Beach was a Price Category I firm.

b. While Long Beach was a Price Category I firm, it never filed the form required to seek permission for a price increase.

c. Long Beach's failure to file a prenotification form precluded it from obtaining a higher price than it received for its sales of crude oil during Phase II.

27. The Phase II regulations did not entitle Long Beach and California (for trust properties) to receive a higher price for sales of crude oil because Long Beach never complied with the reporting requirements.

a. The Phase II regulations required Long Beach to file several reports, including a quarterly report entitled "PC51 Report on Sales, Costs and Profits."

b. Long Beach filed no such reports.

c. Long Beach's failure to file these reports precluded it from obtaining a higher price than

it received for its sales of crude oil during Phase II.

28. The Phase II regulations did not entitle Long Beach and California to receive higher prices because they did not establish that they satisfied the cost-justification and profit-margin tests.

a. Crude oil producers could receive a higher price only to reflect increases in allowable costs since the last price increase or January 1, 1971, whichever was later, reduced to reflect productivity gains and only to the extent that the increase did not result in an increase in profit-margin over the base period.

b. Long Beach and California did not establish that they incurred increased costs since January 1, 1971, that justified a higher crude oil price.

c. Long Beach and California did not calculate base period profit margins or the effect on profit margins of any price increase during Phase II.

d. Long Beach's and California's failure to make these calculations precluded them from receiving higher prices during Phase II.

Phase III: January 11, 1973, to June 13, 1973.

29. On January 11, 1973, the federal government announced Phase III price controls, which controlled plaintiffs' crude oil prices from January 11, 1973, to June 13, 1973.

30. The Phase III price standard provided two alternative tests: First, a firm could increase prices to reflect increased allowable costs so long as the firm's profit

margin did not increase over that which prevailed during the base period. Second, a firm could increase prices to reflect increased allowable costs "a weighted annual average of 1.5% over January 10, 1973 prices" without limit as to profit margin.

31. The Phase III regulations also provided that "[a]djustments in excess of the standard may be made only as necessary for efficient allocation of resources or to maintain adequate levels of supply." The "supply exception" provided only a very limited exception to the price standard, which exception was available only upon a complete record establishing its applicability prior to the time it was used to justify a price increase.

32. The Phase III regulations also provided that "[n]o price increase should be placed into effect which is unreasonably inconsistent with the standard or the goals of the Economic Stabilization Program."

33. The Phase III price controls differed from the Phase II controls in several respects that caused some people to describe Phase III misleadingly as "voluntary." The most important such difference was the elimination of the Phase II requirement that the largest firms prenotify and receive approval from the government for intended price increases. Phase III, instead, placed responsibility in the first instance on each firm to conform its pricing conduct to the Phase III standard. In addition, Phase III replaced the criminal fines and civil penalties, which had been immediately available for violations of the Phase II price standard, with a two-step enforcement procedure for violations of the Phase III price standard, relying in the first instance on administrative orders.

34. The Phase III price standard was, and the government intended it to be, a valid and enforceable regulation, compliance with which was required.

a. The Phase III price standard, like all the Phase III regulations, was a regulation issued pursuant to and in accordance with the policies and purposes of the Economic Stabilization Act.

b. The Cost of Living Council and other officials of the federal government considered the Phase III regulations mandatory regulations with which regulated firms were required to comply. Those officials frequently used analogies to the traffic laws and to the tax laws to illustrate that Phase III, like those laws, was self-administered. Moreover, Phase III applied to all firms in the same way that Phase II applied to all but Price Category I firms.

c. The Cost of Living Council carefully drafted the Phase III regulations to comply with the standards and criteria of the Economic Stabilization Act.

d. The Cost of Living Council had an arsenal of administrative weapons to use against price increases inconsistent with the standard. It had administrative sanctions that it could impose upon a finding of a violation of the existing regulations. The administrative sanctions included an order rolling back a price that violated the Phase III standard, and, while an administrative order could apply only prospectively, such an order in a flagrant case could roll back the price below preexisting levels. The Cost of Living Council could move against a violation of

its orders with the criminal fines and civil sanctions available under the Economic Stabilization Act and the Executive Order that created Phase III. In addition, the Cost of Living Council reserved the authority to impose new and more restrictive pricing rules upon a firm or industry if it found that by so doing "the goals of the [Economic Stabilization Act] would be significantly advanced."

35. A firm was not permitted to self-administer a price increase unless it had first determined that the increase satisfied the Phase III price standard.

36. During Phase III, the federal government sought to continue its virtual freeze of crude oil prices.

a. The Cost of Living Council's responses to General Lincoln's citation of the "supply exception" as a justification for heating oil price increases and to similar remarks relating to possible use of that exception to permit crude oil price increases demonstrate the Council's intention not to permit increases in oil prices that failed to satisfy the specific 1.5 percent and profit-margin standards.

b. The Cost of Living Council caused to be sent a January 22, 1973, letter from Mr. Bennett, the Assistant Director of the Office of Emergency Preparedness, to Mr. Medders, President of the Independent Producers' Association of America, to make clear to crude oil producers that they were entitled to higher prices only to the extent allowed by the 1.5 percent and profit-margin tests.

c. The government used its public hearings on February 7 to 9, 1973, investigating the heating oil price increases "to demonstrate that Phase III had teeth."

d. On March 6, 1973, by its Special Rule No. 1, the federal government reimposed prenotification upon the 23 largest oil companies to the extent that they sought to increase their weighted annual average prices more than 1 percent and an additional .5 percent to reflect increased costs after March 6, 1973. After the announcement of Special Rule No. 1, the Phase III price standard continued to limit the prices that firms in the oil industry not subject to Special Rule No. 1, including independent crude oil producers such as Long Beach and California, could receive.

37. During Phase III, California crude oil producers, including Long Beach and California, continued to complain that California posted prices were artificially too low and the price-gravity differential was artificially too large to be used as the basis for crude oil ceiling prices.

38. The Cost of Living Council considered and rejected the arguments raised by California producers during Phase III. The Cost of Living Council concluded that the California producers' arguments lacked merit and reminded those producers that they were entitled to increased prices only to the extent justified by the Phase III price standard.

39. The Phase III price standard did not permit Long Beach and California to receive higher prices than they received for their crude oil sold during Phase III.

40. Effective May 4, 1973, prices for California crude oils increased 25 cents for crudes 18°API and above and by an additional 1 cent for each degree below 18°API. Long Beach and California received the Phase III base price for their crude oil sales (except for sales of Tract 1 sell-off oil, for which Long Beach received the bonuses plus the Phase II base price).

41. The Phase III price standard did not permit Long Beach and California to receive prices higher than the Phase III base price, except for Long Beach's sales of Tract 1 sell-off oil.

a. Long Beach and California never demonstrated that they could cost justify any higher prices during Phase III. Indeed, they made no effort to determine whether or not they had incurred sufficient allowable increased costs to justify acceptance of the May 4, 1973, increase. Their failure to make these calculations made them not legally entitled to receive any price increase.

b. Long Beach and California were not entitled to rely upon the profit-margin test to receive any price over the base price, including the higher prices they received in May 1973, because they made none of the required profit-margin calculations.

c. Long Beach and California could not use the 1.5 percent test to justify increased prices, including the May 4, 1973, increase, for the additional reasons that they made no calculations to support such increases and the May 4, 1973, increase (of approximately 9 or 10 percent) far exceeded the 1.5 percent authority.

d. Long Beach and California were not entitled to justify higher prices on the "supply exception," because the exception was unavailable for crude oil price increases and, in any event, Long Beach and California did not make the specific showing of necessity required prior to self-administering a price increase based upon the exception.

42. Phase III price control regulations continued unchanged from Phase II the exemption of price adjustments by state and local governments. The exemption permitted Long Beach to receive the exempt price adjustments it had made for Tract 1 sell-off oil, but no more.

Phase III Freeze: June 13, 1973, through August 19, 1973.

43. Effective June 13, 1973, the President imposed a sixty-day freeze on the prices of all goods and services. On August 10, 1973, the freeze was extended through August 19, 1973, for crude oil and petroleum products.

44. The Phase III Freeze applied to state and local governments and did not include an exemption of price adjustments or new prices charged by state and local governments. The Phase III freeze did not permit Long Beach and California to receive higher prices in any of their sales of crude oil.

Phase IV: August 20, 1973, to October 1, 1976, Ceiling Price Increase.

45. Phase IV price control regulations promulgated by the Cost of Living Council became effective on August 19, 1973, at 11:59 p.m. The Phase IV regulations provided that no producer could receive for domestic crude oil a price in excess of the ceiling price, which was defined as the highest posted price on May 15, 1973, for that grade of crude oil in the field plus 35 cents. Effective September

1, 1973, producers could receive for "new" and "released" oil a price in excess of the ceiling price. The regulations defined new oil as the total number of barrels of crude oil produced and sold from a property in a specific month less either the number of barrels of crude oil produced and sold from that property in the corresponding month of 1972, or, where crude oil had not been sold from that property in every month of 1972, one-twelfth of the number of barrels produced and sold from that property in 1972. The regulations, in substance, defined released oil as the number of barrels of oil equal to the number of barrels of new oil produced from a property, so that each barrel of new oil that was produced from a property caused another barrel of oil that otherwise would have been subject to the price ceiling to be released from the ceiling. Domestic crude oil other than new and released crude oil was known as "old" oil.

46. Effective November 16, 1973, producers could also receive for sales of stripper well oil (defined as oil produced from properties whose wells produced an average of ten barrels of oil per day or less) a price in excess of the ceiling.

47. Shortly after the promulgation of the Phase IV regulations, Congress enacted the Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627 (1973), which, together with the Economic Stabilization Act, provided the basis for continued price control and allocation regulation of the oil industry.

48. The Cost of Living Council increased the Phase IV ceiling price for all oil by $1 per barrel effective December 19, 1973, which made the ceiling price equal to the highest price posted by a crude oil producer in the field on May 15, 1973, plus $1.35.

49. On December 26, 1973, the Federal Energy Office, which had been established on December 4, 1973, assumed the Cost of Living Council's crude oil pricing functions.

50. In June 1974, the Federal Energy Administration succeeded to the Federal Energy Office's crude oil pricing functions.

51. Effective February 1, 1976, the Federal Energy Administration expanded ceiling price rules to cover the previously uncontrolled regulatory categories of new, released and stripper oil. In so doing, the Federal Energy Administration implemented § 8(c) of the Emergency Petroleum Allocation Act of 1973, as amended by the Energy Policy and Conservation Act of 1975 (Pub. L. 94-163, 89 Stat. 871 (1975), § 401(a)), which required a national maximum weighted average price for all crude oil of $7.66 per barrel. To achieve this national weighted average price, the agency retained its ceiling price rule for the regulatory category of old oil, which became known as "lower-tier" oil. In addition, it created from the old categories of new oil and stripper oil a category known as "upper-tier" oil upon which it imposed a ceiling price equal to the highest posted price applicable to transactions in new, released and stripper crude oil in the same or nearest field for that grade of crude oil on September 30, 1975, less $1.32 per barrel. The agency eliminated the regulatory category of released oil.

52. The Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125 (1976), enacted in September 1976 made three significant changes in the ceiling price rules: (1) it permitted larger increases in the national weighted average price to create production incentives, (2) it authorized the Federal Energy Administration to increase ceiling prices for California and

Alaska crude oils and (3) it freed stripper crude oil from price ceilings, creating a third tier.

53. Acting pursuant to the Energy Conservation and Production Act's authorization, the Federal Energy Administration increased the ceiling prices for California and Alaska crude oil by 2 cents for each degree that the crude oil fell below 40°down to 34° and by 3 cents for each degree that the crude oil fell below 34°.

54. The posted prices for California old (lower-tier, after February 1, 1976) crude oil remained at ceiling prices until the increase in California and Alaska ceiling prices, which was effective October 1, 1976. From the beginning of Phase IV on August 19, 1973, to October 1, 1976, plaintiffs received at least the ceiling prices for their sales of old oil.

55. The Cost of Living Council specifically decided to use the May 15, 1973, posted prices rather than the May 1, 1973, posted prices, as was first proposed, in order to permit California producers to receive the benefit of the posted price increase that became effective May 4, 1973.

56. At the time it made its decision to use the May 15, 1973, posted prices, the Cost of Living Council had investigated and rejected the plaintiffs' complaints that California posted prices were artificially too low and the differential artificially too large to use those prices as the reference for federal ceiling prices.

57. The Cost of Living Council concluded on the basis of its investigation that use of the May 15, 1973, posted prices, including the California posted prices after the May 4, 1973, increase, would serve its objective of preserving the historical posted price differentials, and thereby establishing viable and internally consistent ceiling prices.

58. The Cost of Living Council did not consider that its mandate was to select "competitive" prices. Nonetheless, because the Cost of Living Council was mindful of the California producers' allegations, it conducted investigations to determine whether the California price-gravity differentials were appropriate in the market. The investigations, which included a survey of prices posted and paid in California as well as a composite-barrel analysis of the value differential between light and heavy crude oil conducted by the Stanford Research Institute, revealed no impropriety in the California posted prices.

59. While the Cost of Living Council recognized that its investigation could not establish beyond doubt the propriety of these postings, it considered that the investigation provided a sufficient basis to conclude that any remaining possibility of an undetected problem was entirely outweighed by the importance of taking advantage of the May 15, 1973, postings as a viable, internally consistent basis for ceiling prices.

60. The Acting Deputy Director and General Counsel of the Cost of Living Council asserted the conclusion that the fact that the May 15, 1973, posted prices and price-gravity differentials were consistent with the historical practice in California was sufficient justification for their use as ceiling prices regardless as to any question as to their propriety. He stated the belief that the appropriate role of the price control program was to stop inflation and not to institute economic or social reforms.

61. After the Cost of Living Council issued proposed Phase IV regulations that included the May 15, 1973, reference date, the California producers renewed their complaints about the level of California prices and the differentials. The Cost of Living Council considered these comments but concluded that they provided no persuasive

reason to overturn its earlier determination to use the May 15, 1973, posted prices as the reference for Phase IV ceiling prices.

62. The final Phase IV regulations added a 35 cent increment to the May 15, 1973, posted prices in accordance with the Cost of Living Council's policy to make "periodic upward adjustments in ceiling prices" toward the higher world prices for crude petroleum, in recognition of world price increases that had occurred subsequent to the initial decision to freeze prices and the resulting increase in some, but not all, domestic crude oil prices between May 15, 1973, and the Phase III Freeze.

65. The Phase IV exemption applied only to new prices charged and price adjustments by state and local governments where (1) as a matter of contract the governmental entity had the right unilaterally to adjust prices or to charge a new price and (2) the entire benefit of any such price adjustment flowed exclusively to the governmental entity.

66. The Phase IV exemption permitted Long Beach and California to receive the benefit of exempt price adjustments they had previously made for sales of sell-off or in-kind royalty oil and to charge any new prices or to make any new price adjustments that they were contractually permitted to make. The exemption did not permit them to receive higher prices in sales of oil for which they were contractually committed to a price they could not unilaterally adjust or for which they shared the benefit of the price increase with a private party.

67. On or about August 29, 1973, William J. Lamont, an attorney representing the Joint Committee on Public Domain of the California Legislature, telephoned William N. Walker, General Counsel of the Cost of Living Council,

to inquire whether California's proposed sales of sell-off and in-kind royalty oil were covered by the Phase IV exemption. After reviewing the June 9, 1972, Internal Revenue Service ruling that sales of sell-off oil were included within the Phase II exemption, which ruling he found controlling, Mr. Walker on or about August 31, 1973, orally advised Mr. Lamont that California's proposed sales of its sell-off and in-kind royalty oil were covered by the Phase IV exemption. By a letter dated September 6, 1973, Mr. Walker confirmed in writing his verbal advice that California's proposed sales of its sell-off and in-kind royalty oil were covered by the Phase IV exemption. Mr. Walker intended in his September 6, 1973, letter to address, only the specific question presented to him as to whether California's proposed sales of its sell-off and in-kind royalty oil were covered by the Phase IV exemption, although the actual terms of the letter were much broader. The then current representatives of the plaintiff were fully aware of the limited nature of the confirmed exemption.

68. The Cost of Living Council caused a notice of proposed rulemaking to rescind the Phase IV exemption of new prices charged by and price adjustments by state and local governments to be published in the October 26, 1973, Federal Register. The notice, on its face, stated that it was directed toward oil that was "being taken in kind and sold by State or local governments." In addition, the notice made clear in several other respects that it applied only to sell-off and in-kind royalty oil.

69. California confirmed to the Cost of Living Council by a telegram dated October 30, 1973, from Mr. Flournoy to Mr. Walker its awareness that the purpose of the proposed rulemaking was to remove the exemption con-

cerning its ongoing sales of sell-off oil and its proposed sales of in-kind royalty oil.

70. Under cover of a letter dated November 15, 1973, California submitted comments to the Cost of Living Council opposing the proposed rulemaking removing the Phase IV exemption of sales of in-kind royalty oil and sell-off oil. California's comments made it clear that it knew that the Phase IV exemption applied only to sales of sell-off oil and in-kind royalty oil.

71. By a letter dated November 16, 1973, Long Beach submitted comments to the Cost of Living Council, opposing the proposed rulemaking removing the Phase IV exemption. Long Beach's comments also made it clear that it knew that the Phase IV exemption applied only to sales of sell-off and in-kind royalty oil.

72. Beginning in early December, Long Beach and California demanded prices in excess of the Phase IV old oil ceiling prices for their sales of net profits oil and prices in excess of the old oil ceiling prices plus the exempt bonuses for sales of sell-off oil. Aware of the economic impact of California's and Long Beach's demands, the Federal Energy Office, on February 21, 1974, took action on the notice of proposed rulemaking published by the Cost of Living Council on October 26, 1973, by rescinding, effective October 25, 1973, the Phase IV exemption of certain new prices and price adjustments by state and local governments.

73. On March 13, 1974, the Federal Energy Office conducted a hearing to determine whether it should reconsider its February 21, 1974, recision of the Phase IV exemption of certain new prices charged by and price adjustments by state and local governments.

74. At the March 13, 1974, hearing, California and Long Beach argued for the first time to federal pricing officials that the Phase IV exemption applied to their sales of net profits oil.

75. At the March 13, 1974, hearing, California and Long Beach challenged the Federal Energy Office's finding in support of its February 21, 1974, ruling that continuance of the Phase IV exemption would have no impact on the supply of oil by arguing that they had recommended a substantial increase in the 1974 budget of the Long Beach Unit for the purpose of increasing or maintaining production levels on the assumption that the Phase IV exemption applied to their sales of net profits oil.

76. At the March 13, 1974, hearing, Long Beach also challenged the Federal Energy Office's finding in support of its February 21, 1974, ruling that continuance of the Phase IV exemption would disproportionately impact independent refiners by arguing that the bulk of its sales of oil were to major companies rather than to independent refiners. This argument, too, assumed that the Phase IV exemption extended to net profits oil.

77. An internal Federal Energy Office memorandum reporting on the March 13 hearing stated that crude oil produced from the Long Beach Unit of the Wilmington Field is of two types — royalty oil, for which the exemption permitted the governmental entity to receive a price in excess of the ceiling price, and working interest oil, the author's name for net profits oil, which the exemption did not affect in any way.

78. On April 2, 1974, the Federal Energy Office confirmed its February 21, 1974, recision of the Phase IV exemption, but responding to complaints about the retro-

active effect of the February 21 ruling, extended the Phase IV exemption for the period from October 25, 1973, to February 21, 1974, for contracts in effect prior to October 25, 1973.

79. In its April 2, 1974, ruling, the Federal Energy Office considered and rejected California's and Long Beach's arguments that the Phase IV exemption, while it was in effect, had applied to sales of net profits oil under the Tract 1 Contractors' Agreement.

80. In its April 2, 1974, ruling, the Federal Energy Office stated that the assumption in its February 21, 1974, ruling that the Phase IV exemption created no incentive for increased production "was not seriously disputed." The Federal Energy Office made this statement because it had rejected the City's and State's contention that the exemption applied to net profits oil, upon which their argument that the exemption provided such an incentive was based.

81. The Federal Energy Office also rejected Long Beach's challenge to the February 21 ruling's finding that continuance of the exemption would disproportionately affect independent refiners because it had rejected the contention that the exemption applied to net profits oil.

82. In its April 1974 ruling, the Federal Energy Office specifically ruled that the continued exemption applied only to sales pursuant to contracts that provided a bonus over prices for old oil as determined under the Tract 1 Contractors' Agreement and not to sales pursuant to the Tract 1 Contractors' Agreement itself. Since the exemption that was in effect from October 25, 1973, to February 21, 1974, was the same as that which existed prior to October 25, 1973 (for contracts in effect prior to October 25, 1973), this statement is a current statement of posi-

tion by the Federal Energy Office that the exemption never applied to sales of net profits oil pursuant to the Tract 1 Contractors' Agreement, and, because they are in all relevant respects identical, the other net profits contracts.

83. In its April 1974 ruling, the Federal Energy Office also ruled that the price for sell-off oil was to be calculated by adding the bonus "to the price for 'old' domestic crude oil as determined under [the Tract 1 Contractors' Agreement]." In that statement, the agency explicitly ruled that the price determined under the Tract 1 Contractors' Agreement was the price for old oil and that the price for previously sold sell-off oil was the old oil price plus the bonus.

106. Any Conclusion of Law set forth below which should be deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. This Court concludes in all respects as set forth in the foregoing Findings of Fact. Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

2. No genuine issue as to any material fact exists with respect to the defendants' motion for partial summary judgment, and it is therefore appropriate for disposition pursuant to Fed. R. Civ. P. 56.

3. By limiting treble damage actions to persons who have been "injured in [their] business or property by reason of" a violation of the antitrust laws, section 4 of the Clayton Act requires that a plaintiff prove more than that a defendant violated the antitrust laws. A plaintiff must also prove that the violation proximately caused it

legal injury. *E.g., Windham v. American Brands, Inc.*, 565 F.2d 59, 65-66 (4th Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 968 (1978); *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 230-31 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Winckler & Smith Citrus Prods. Co. v. Sunkist Growers, Inc.*, 346 F.2d 1012, 1014n.1 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965).

4. A defendant's violation of the antitrust laws can be the proximate cause of a plaintiff's damage only if the plaintiff establishes a clearly traceable causal connection between the violation and the injury. The plaintiff has the burden of showing that the violation was a "substantial factor in bringing about" his injury. *Flinkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

5. The causal connection between the violation and its damages must amount to causation in law and the plaintiffs' damage must amount to "legal injury." *Winckler & Smith Citrus Prods. Co. v. Sunkist Growers, Inc., supra.*

6. A plaintiff may not recover under the antitrust laws for damage it suffered as a result of actions of the federal government. *United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965). Thus, as a matter of law, plaintiffs' claim that they are entitled to recover damages based upon an alleged "lock-in" of conspiratorially-low posted prices into the federal government's ceiling prices does not satisfy the requirement that the defendants' conduct be the legal cause of plaintiffs' damage.

7. A plaintiff who is unable to establish a legal right to receive that which it alleges the antitrust violation denied it has not suffered "legal injury." *See e.g., Keogh v. Chicago & N. Ry.*, 260 U.S. 156, 165 (1922); *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light*

Co., 214 F.2d 413, 418 (5th Cir. 1954); *Monticello Heights, Inc. v. Morgan Drive Away, Inc.*, 1974-2 Trade Cas. ¶ 75,282, at 97,860 (S.D.N.Y.). Plaintiffs' "lock-in" theory also does not satisfy the "legal injury" requirement, because, whenever they received the ceiling price, they had no right to receive the higher prices that they allege the conspiracy denied them.

8. Accordingly, plaintiffs' claims for damages based upon their sales of crude oil from April 12, 1972, to October 1, 1976, for which they received the federal ceiling prices, must be dismissed.

9. Furthermore, beginning April 12, 1972, there is no clearly traceable causal connection between the defendants' pre-price control prices and the plaintiffs' alleged injury. The government's decisions to use those prices, after at each step of its price control program considering and rejecting plaintiffs' repeated arguments that it should not use the existing California posted prices as ceiling prices, broke the causal chain between those prices and plaintiffs' alleged injury.

a. The causal chain was broken by the Price Commission's decisions during Phase II, in order to accomplish its overriding goal of fighting inflation, to reject the California producers' arguments that California crude oil prices were too low and the differential was too large to make those prices appropriate ceiling prices.

b. The causal chain was also broken by the Cost of Living Council's decision during Phase III, after considering the arguments of California producers that California prices were too low, to reject, in favor of its fight against inflation, requests for increased prices.

c. The causal chain was again broken by the federal government's decision, on the basis of its investigation into the propriety of using May 15, 1973, posted prices, including the California posted prices after the May 4, 1973, increase, to use those posted prices as the reference for Phase IV ceiling prices because they would serve its price-control objective of preserving the historical posted price differentials and thereby establishing viable and internally consistent ceiling prices.

10. A price-fixing conspiracy after April 12, 1972, assuming that the plaintiffs were able to prove such a conspiracy, was superseded by government action as a substantial factor in fixing the ceiling prices plaintiffs received for their price-controlled crude oil and, therefore, is irrelevant to plaintiffs' claims for damages for price-controlled crude oil.

July 17, 1984

WILLIAM P. GRAY

William P. Gray
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

Nos. 84-8237
84-8238

DC# CV-75-2232 WPG
Central California

ORDER

Before: SCHROEDER and REINHARDT, Circuit Judges.
Filed January 22, 1985.

Plaintiffs petition this court for permission to appeal two interlocutory orders under 28 U.S.C. § 1292(b). They have also filed similar petitions with the Temporary Emergency Court of Appeals. The Temporary Emergency Court of Appeals has exclusive jurisdiction over cases arising under the Economic Stabilization Act, 12 U.S.C. § 1904 note, the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1), and regulations thereunder. These appeals appear to qualify as arising under those provisions, *See United States v. Wyatt*, 680 F.2d 1080, 1085 (5th Cir. 1982); *United States v. Wickland*, 619 F.2d 75, 78 (Temp. Emer. Ct. App. 1980). Therefore, the petitions are denied, for lack of subject matter jurisdiction. This action is without prejudice to renewal of the petitions in the event that the Temporary Emergency Court of Appeals rules that it lacks subject matter jurisdiction.

MoCal 1/14/85

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF LONG BEACH, et al.,
Plaintiffs-Appellants,
vs.
STANDARD OIL CO. OF CALIFORNIA, et al.,
Defendants-Appellees.

Nos. 86-5859
86-5860

DC# MDL-150-WPG
Central California

ORDER

Before: GOODWIN and ALARCON, Circuit Judges.
Filed October 29, 1986.

Before the court are a number of motions concerning briefing of these appeals. One of the issues on appeal ("the price ceiling issue") is also raised in a pending appeal before the Temporary Emergency Court of Appeals (TECA). TECA has not yet determined whether it has jurisdiction over that issue. If it does have jurisdiction, that jurisdiction is exclusive, and the price ceiling issue would not be properly before this court. *See Mobil Oil Corp. v. Department of Energy*, 728 F.2d 1477 (Temp. Emerg. Ct. App. 1983), *cert. denied*, 467 U.S. 1255 (1984).

A decision by TECA on whether it has jurisdiction over the price ceiling issue will determine whether this issue should be briefed in this court. Accordingly, all briefing is stayed until TECA decides whether it has jurisdiction over the price ceiling issue, or for a period of six months, whichever occurs first. Upon expiration of this stay, the parties shall file status reports, and, if appropriate, supplemental briefs in support of their motions to establish a briefing schedule.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY OF LONG BEACH,

Plaintiff-Appellant,

vs.

STANDARD OIL CO. OF CALIFORNIA, et al.,

Defendants-Appellees.

Nos. 86-5859
86-5860

DC# MDL-150-WPG
Central California

ORDER

Before: GOODWIN AND ALARCON, Circuit Judges.
Filed August 24, 1987.

This appeal is further stayed for three months from the entry of this order or until the Temporary Emergency Court of Appeals decides whether it has jurisdiction over the price ceiling issue, whichever occurs first. Within 7 days of the expiration of the stay, plaintiffs shall file a status report. Defendants may respond within 7 days of service of the status report.

MoCal 9/22/86

APPENDIX G

EXECUTIVE OFFICE OF THE PRESIDENT
PRICE COMMISSION
WASHINGTON, D.C. 20508

April 12, 1972

Mr. Glenn C. Ferguson, President
Independent Oil and Gas
Producers of California
P. O. Box 2427
Bakersfield, California 93303

Mr. C. C. Albright, President
California Independent
Producers Association
P. 0. Box 282
Corona Del Mar, California 92625

Dear Messrs. Ferguson and Albright:

The Commission has received your letter inquiring if exceptions to the price guidelines may be made to enable parity of California crude oil prices with prices of crude oil in other areas of the Nation. We have thoroughly considered the arguments presented.

In keeping with its established procedures and policies, the Commission does not make decisions on price increases for a group of firms. But rather, decisions are made on a case by case basis depending on the effects of incurred costs on each individual firm. Action on each Tier I firm, therefore, will be considered when the Com-

mission receives an application from each firm requesting a price increase on the basis of increases in incurred costs. These individual requests will be carefully considered.

Without regard to particular merits of your arguments on the need for parity to accomplish exploration, I should emphasize that our mission is of limited scope in the context of problems of the California Independent Oil Producers. The Commission's function is to control inflation by controlling price increases. Our program is not designed to reallocate resources or correct economic balances.

We appreciate your inquiry and your continued support of the Economic Stabilization Program.

Sincerely,

Louis P. Neeb
Executive Secretary

APPENDIX H

February 25, 1972

Price Commission
2000 "M" Street N.W.
Washington, D. C. 20508

Attention: C. Jackson Grayson, Jr., Chairman

Gentlemen:

We are writing you on behalf of our respective associations which jointly represent most of the active independent oil producers in California. We wish to inquire if exceptions to the price guide lines may be made in order to enable the California crude oil prices to be brought up to parity with the price of crude oil existing in comparable oil producing areas of the nation.

In using the Wilmington area of California as a comparison with the Upper Gulf Coast of Texas, the difference in oil price by gravity between the two areas becomes apparent. The following chart taken from the attached graph of crude oil Posted Prices briefly illustrates the differences:

Gravity	Wilmington, Calif.	Upper Gulf Coast, Texas	Differences in Price
30°	$3.38	$3.70	$.32
26°	3.17	3.62	.45
22°	2.89	3.54	.65
18°	2.61	3.48	.87

The discrepancy in the posted price between the two comparable areas is caused largely by an imbalance in the oil gravity differential. For example, Texas crude declines

in price 2 cents per gravity degree while California crude declines in price 5 to 7 cents per gravity degree. This results in a progressively unrealistic lower price for California crudes.

This injustice existed prior to the initiation of Price Controls. The solution can be accomplished by adjusting California crude oil prices to a point of parity with other comparable producing areas i.e., the Upper Gulf Coast of Texas. The gravity differential should reflect no more than 2 cents per degree to be in conformity. The reason this price differential has existed in the past is the fact that until a few years ago refineries were tooled to produce a high percentage of fuel oil. This product often became a drug on the market which depressed the value of lower gravity crude oil since this type of oil, when refined by methods then used, produced a much higher percentage of fuel oil than high gravity oil (the lower the gravity the more fuel oil). The obvious economic result was that lower gravity crudes were simply worth less in proportion to higher gravities.

With the displacement of the burning of fuel oil by natural gas because of air pollution, refineries were forced to retool. Through the use of hydrocracking procedures, low gravity oil can now be refined (or cracked) into a very high percentage of high quality gasoline as well as other products much more valuable than fuel oil. The actual value difference between a barrel of low gravity oil as compared to high gravity crude is therefore minimal with current methods of refining. Yet, the large differential in price between gravities has persisted.

Prior to the price freeze, independent associations had been making some progress toward a proper price readjustment. The major purchasers recognize that the marked differential in values no longer exist but they can

do nothing about it because of the price controls. We are therefore asking that an exception for California crude oil be made in order that the purchasers be freed to make the necessary price adjustments up to parity with other comparable oil producing areas.

That California crudes have greater value is indicated by the fact independent refineries were offering a bonus above posted prices before the price freeze. Evidence of the under-pricing and increased demand for California crude oil was shown on November 8, 9, and the 10th of 1971, when independent refiners competitively bid 15 to 21 cents per barrel bonus over the posted price for 12,000 barrels per day of 20 gravity oil from the State's share of production from the Long Beach Unit of the Wilmington Field. This sale of crude oil was for a three year period commencing April 30, 1972, and had previously on October 14, 1971, been declared valid by the Office of Emergency Preparedness. Also, an upward adjustment in the prices of California crude oil will result in a much needed renewal of exploration in prospective areas of the State.

During 1970, according to the annual report of the Reserves Committee of the American Petroleum Institute, there were no new oil field discoveries in California and the proved oil reserves had a net decline of 259 million barrels from 4.24 billion barrels to 3.98 billion barrels. This was the largest decline in 1970 for any oil producing State. In addition, preliminary reports indicate the consumption of oil in California has been far in excess of new reserves discovered during 1971. The grim reality of energy shortages no matter how it may have been caused was previewed recently in England.

The increased revenue thus generated for independent oil producers will provide the necessary additional capital to explore for new reserves of both oil and gas. Indepen-

dent operators have historically done more exploration onshore and consequently have discovered far more oil than any other segment of the oil industry. The proper incentive is all that is needed to assure their continued leadership.

The discovery of new gas reserves is essential to keeping many industries operating in this State and a consequent high level of employment. Utilities are sorely pressed to keep many of their current industrial users on stream. Gas reserves in the State of California are insufficient to even meet the increased demands during the winter months merely as a supplement to imported gas from other States and Canada. The reluctance on the part of Canada to permit new contracts for export to the United States together with the unavailability of gas from other States because of unrealistic price controls at the wellhead by the Federal Power Commission for interstate use has precluded the possibility of the importation of new supplies into California. Any new gas supply which can be found within this State should help alleviate the problem and to keep industries humming, thus avoiding a rise in unemployment.

The shutting down of major industries all over the State would obviously be a catastrophe. This is the grim reality we are facing in the not too distant future if some immediate steps cannot be taken to alleviate the problem.

Other economic benefits would inure to the State and local governments in the form of additional tax revenue as well as increased royalties from offshore production to the Federal Government.

In conclusion, we request that an exception be made to the Price Control regulations as related to California where there is an unrealistic difference in the price of

crude oil as compared with other oil producing areas within the country having similar marketing and refining facilities. The injustice of lower crude prices for California producers primarily because of an imbalance in the gravity differential which existed prior to the time price controls went into effect, should be rectified. This would enable the California producers to attain parity with the end result of a more healthy California oil industry, greater assurance of a continuing supply of energy to keep all industries functioning with a high rate of employment, and a general strengthening of the National Security.

In the event you should like to question us further, we will be available on a few days notice for a hearing in your offices, or should you require additional information, please contact us at the address indicated beneath our respective signatures.

Sincerely,

Glenn C. Ferguson, President
Independent Oil & Gas
Producers of California
P. O. Bin 2427
Bakersfield, Calif. 93303
Phone: (805) 327-4811

C. C. Albright, President
California Independent
Producers Association
P. O. Box 283
Corona Del Mar, Calif. 92625
Phone: (213) 424-7400

Enc.

STATUTORY APPENDIX

UNITED STATES CONSTITUTION

ARTICLE III. — THE JUDICIARY

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Economic Stabilization Act of 1970

§ 211(b)(2)

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

Emergency Petroleum Allocation Act

§ 754(a)(1)

§754. Administration and enforcement; delegation of authority; civil and criminal penalties

(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

28 U.S.C. §1254(1)

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1651(a)

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

15 U.S.C. § 15

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

AMENDED
PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 7, 1987, I served the within PETITION FOR WRIT OF CERTIORARI in re: "City of Long Beach and State of California vs Exxon Corporation, Mobil Oil, Shell Oil, Chevron, Texaco Inc. and Union Oil" in the United States Supreme Court October Term 1987 No. A-203.

On the Parties in said action, by placing One copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John K. Van de Kamp,
Attorney General of the
State of California
Sanford N. Gruskin,
Assistant Attorney General
Richard N. Light,
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

John R. Calhoun, Esq.
City Attorney
James N. McCabe, Esq.
Deputy City Attorney
City Hall, 11th Floor
333 West Ocean Boulevard
Long Beach, California 90802

Royce H. Schulz, Esq.
Gary L. Halling, Esq.
Broad, Schulz, Larson &
Wineberg
One California Street, 14th
Floor
San Francisco, California 94111

Hoecker, McMahon & Wade
Gary W. Hoecker
M. Brian McMahon
612 S. Flower Street
Suite 800
Los Angeles, California 90017

Robert C. Hight, Esq.,
Chief Counsel
State Lands Commission
1807-13th Street
Sacramento, California 95814

Leslie C. Randall, Esq.
Mauryne S. Fennell, Esq.
Texaco Inc.
10 Universal City Plaza,
Suite 1300
Universal City, CA 91608

Robert D. Wilson, Esq.
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650

Milton J. Schubin, Esq.
Barry Willner, Esq.
Aton Arbisser, Esq.
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, New York 10022

Philip K. Verleger, Esq.
David A. Destino, Esq.
McCutchen, Black, Verleger
& Shea
600 Wilshire Boulevard
Los Angeles, CA 90017

A. P. Lindemann, Jr., Esq.
Exxon Corporation
1251 Avenue of the Americas
New York, New York 10020

Kenneth Fountain, Esq.
Exxon Company, U.S.A.
800 Bell Street, Suite 1861
Houston, Texas 77002

Darryl Snider, Esq.
Brobeck, Phleger & Harrison
444 South Flower Street
Suite 4300
Los Angeles, CA 90017

Harold E. Zahner, Esq.
Joan Benjamin Brown, Esq.
Union Oil Company
461 South Boyleston
10th Floor, Legal Department
Los Angeles, California 90017

Andrew J. Kilcarr, Esq.
Maureen O'Bryon
Hogan & Hartson
555 13th Street, N.W.
Washington, D.C. 20004

Charles F. Rice, Esq.
Mobil Oil Corporation
150 E. 42nd Street
New York, New York 10017

William Simon, Esq.
John S. Kingdon, Esq.
Alan M. Grimaldi, Esq.
Howrey & Simon
1730 Pennsylvania Avenue,
N.W.
Washington, D.C. 20006

Raymond V. McCord, Esq.
Shell Oil Company
West Coast Litigation
523 West 6th Street, Suit 540
Los Angeles, California 90014

Otis Pratt Pearsall, Esq.
Hughes Hubbard & Reed
One Wall Street
New York, NY 10005

Ronald C. Redcay, Esq.
Matthew T. Heartney, Esq.
Hughes Hubbard & Reed
555 S. Flower Street
Suite 3700
Los Angeles, CA 90071
By Hand

Anthony P. Brown, Esq.
Philip L. Judson, Esq.
Robert P. Taylor, Esq.
Edward V. Anderson, Esq.
Pillsbury, Madison & Sutro
225 Bush Street
P.O. Box 7880
San Francisco, CA 94120

Paul R. Truebenbach, Esq.
Law Department
Chevron Corporation
225 Bush Street, Room 1170
San Francisco, California 94104

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 7, 1987, at Los Angeles, California

CE CE MEDINA